Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

L. P. PATTERSON, et al., *Petitioners,*

v.

NATIONSBANK OF TEXAS, N.A., et al., *Respondents.*

consolidated with

L. P. PATTERSON, et al., *Petitioners,*

v.

BANK ONE, TEXAS, N.A., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December, 1995

35 pp

QUESTIONS PRESENTED

Is the Comptroller of the Currency's construction of the term "visitorial" in the Federal Reserve Act, 12 U.S.C. § 484(a), preemptively depriving state legislatures of the power to subpoena information from national banks in the course of drafting or studying proposed legislation, binding upon federal courts?

Does the "plain statement rule" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), preclude the Comptroller from engaging in interpretive rulemaking that preemptively deprives state legislatures of their subpoena power, or alter the standard of review for such rulemaking?

LIST OF PARTIES

L.P. PATTERSON State Representative	Petitioner
CHARLES FINNELL State Representative	Petitioner
RENATO CUELLAR State Representative	Petitioner
JUDY HAWLEY State Representative	Petitioner
TRACY O. KING State Representative	Petitioner
BARBARA RUSLING State Representative	Petitioner
BOB RABUCK State Representative	Petitioner
GARY WALKER State Representative	Petitioner
DAVID SWINFORD State Representative	Petitioner
NATIONSBANK OF TEXAS, N.A.	Respondent
TIMOTHY P. HARTMAN Chairman of NationsBank	Respondent
ROBERT B. LANE President of NationsBank	Respondent

BANK ONE, TEXAS, N.A.	Respondent
HARVEY MITCHELL Chairman of Bank One, Texas, N.A.	Respondent
RONALD STEINHART President of Bank One, Texas, N.A.	Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THIS COURT:

Members of the Standing Committee on Agriculture and Livestock of the Texas House of Representatives, L.P. Patterson, Chairman, Renato Cuellar, Vice-Chairman, Charles Finnell, David Swinford, Bob Rabuck, Judy Hawley, Tracy O. King, Barbara

Rusling and Gary Walker (the "State Representatives" or "Legislative Committee")[1], by and through their Attorney Dan Morales, Attorney General of Texas, now respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in favor of two national banks, Bank One, Texas, N.A., and NationsBank of Texas, N.A. ("the Banks"), and individually named officers and/or directors of those Banks.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit is reproduced in the Appendix (page numbers designated "A") (separately bound and filed herewith) at A-1. The unpublished opinion of the district court is also reproduced in the Appendix (A-3), as are the OCC opinion letters. (A-8 and A-14).

JURISDICTION

The Fifth Circuit entered judgment on September 11, 1995. No petition for rehearing was filed. The State Representatives invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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1 New members of the Legislative Committee, Judy Hawley, Tracy O. King, Barbara Rusling and Gary Walker, were substituted for Elton Bomer, Allen Hightower, Mary Denny James, Jerry Johnson, Bob Turner and Bernard Erickson, who were no longer on the Committee when the district court's judgments were appealed to the Fifth Circuit. FED. R. APP. P. 43(c)(1). Also, the name of the Committee has been changed from the Standing Committee on Agriculture and Wildlife Management to the Committee on Agriculture and Livestock.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301.024 of the Texas Government Code, TEX. GOV'T CODE ANN. § 301.024 (West 1988), sets out the subpoena power of the Legislative Committee. The Banks, in arguing that federal law preempted the legislative subpoenas, relied on the following statutes, interpretive rules and agency opinion letters: 12 U.S.C.A. §§ 484, 485 (West 1989); 12 C.F.R. § 7.6025(b) (1993); 1993 WL 639366 (OCC Interpretive Letter 616, February 26, 1993); 1993 WL 740918 (OCC Opinion Letter, June 3, 1993). These materials are reproduced in the Appendix accompanying this Petition. SUP. CT. R. 14.1.(f).

STATEMENT OF THE CASE

A. Factual background.

The State Representatives are members of the Standing House Committee on Agriculture and Livestock. (R.NB. Vol. 1, 0002.)[2] The Legislative Committee became concerned about the availability of credit in rural communities in Texas. The State Representatives believed that bank lending practices--particularly as they affect rural communities--were an appropriate subject for legislative study. (R.NB. Vol. 1, 0127, 0207).

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2 The record in *NationsBank of Texas v. Patterson*, civil action no. 3:93-CV-1107-G, is referred to as ("R.NB. _____"). The record in *Bank One Texas v. Patterson*, civil action no. 3:93-CV-1081-G, is referred to as ("R.BO._____").

With the cooperation of such entities as the Farmers Home Administration of the United States Department of Agriculture, the Independent Bankers' Association, and various consumer groups, the State Representatives amassed a great deal of information on agricultural finance. The Committee also examined the public reports of independent banks, to determine the level and type of lending in the communities they served. (R.NB. Vol. 1, 0208, 0212-14).

However, a major gap in the Legislative Committee's information was the scope lending by national banks that had statewide branch operations. The Committee could not determine the lending patterns of these banks within various regions of the state, because they publicly reported their activities only on a statewide or consolidated basis. (R.NB. Vol. 1, 0208-14.) The Legislative Committee concluded that without such information, it could not make informed legislative recommendations for a carefully considered, well-reasoned assistance program. (R.NB. Vol. 1, 0208-14).

When it became clear the Banks would not voluntarily produce the information sought, the Legislative Committee issued subpoenas, pursuant to section 301.024 of the Texas Government Code. TEX. GOV'T CODE ANN. § 301.024 (West 1988) (R.NB. Vol. 1, 0014-27, 0127-28, 0208-13).

B. The Law Suit.

Pursuant to 28 U.S.C. § 1331, the Banks brought separate lawsuits for injunctive and declaratory relief, arguing that the Federal Reserve Act (the "Act"), 12 U.S.C. § 484(a), and an informal interpretive rule adopted by the Comptroller, 12 C.F.R. § 7.6025(b) (1993), preempted the legislature's power to issue the subpoenas. On cross-motions for summary judgment, the district court held for the Banks.

In support of its judgments declaring the subpoenas void and enjoining their enforcement, the court concluded that because Congress had not "directly spoken to the precise question at issue," *i.e.*, whether the legislative subpoenas were an exercise of "visitorial" power within the meaning of 12 U.S.C. § 484, the question before the court was whether the Comptroller's interpretive rule was "based on a permissible construction of the statute." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The court concluded that the Comptoller's construction was reasonable. However, the court did not address whether the subpoenas were an exercise of state sovereignty going to "the heart of representative government," so as to require application of the "plain statement rule" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). On consolidated appeal, the Fifth Circuit summarily affirmed the judgments, concluding the district court had committed no error of law or abuse of discretion.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF REASONS

Serving a legislative subpoena on a national bank is not an exercise of visitation. More importantly, the Comptroller's erroneous interpretation threatens the proper balance of federal and state power in the field of national banking. Regulation of national banking has been one of dual control since the passage of the first National Bank Act in 1863. The rights of national banks to contract, collect debts, and acquire and transfer property are all based on state law. As recently as last year, Congress reaffirmed in the Riegle-Neal Interstate Banking and Branching Efficiency Act that state laws regarding community reinvestment, consumer protection and fair lending apply to any branch in the host state of an out-of-state national bank to the same extent as such laws apply to a branch of a bank chartered by that state.

Therefore, the issue of whether the Comptroller's interpretive rule and opinion letters contain a permissible construction of the Act presents an important federal question which has not been, but should be, decided. The fundamental importance of this issue rests on the straightforward proposition that state legislatures cannot intelligently address questions of policy without an understanding of the facts. Denying legislatures the power to investigate is tantamount to depriving them of the ability to legislate effectively.

The permissibility of the Comptroller's construction also raises the important federal question of how much discretion an administrator has in adopting preemptive interpretive rules. In this case, the Comptroller adopted a definition of "visitorial" that has no basis in the federal statute, the case law, common law or common usage. At issue, then, is whether "permissible construction" allows an agency to manufacture a preemptive definition out of whole cloth.

The Legislative Committee's issuance of subpoenas in the course of carrying out its legislative duties is clearly an exercise of state sovereignty of the most fundamental sort. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court addressed the question of whether the federal Age Discrimination in Employment Act preempted a requirement in the Missouri constitution that judges retire at the age of seventy. It held that the power to establish the qualifications of those who would govern was among the state decisions that "go to the heart of representative government." *Id.* at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634 (1973)). Because of this, Congress had to make its intention to preempt "unmistakably clear in the language of the statute." *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

Because this Court did not clearly define the circumstances in which this "plain statement rule" applies, it should now address the important federal question of whether the Legislative

Committee's issuance of subpoenas is among those state decisions that "go the heart of representative government." The subsidiary question of how and when the plain statement rule applies to preemptive agency rulemaking is an equally important federal question which has not been, but should be, squarely addressed by this Court.

II. ARGUMENTS AND AUTHORITIES AMPLIFYING THE REASONS FOR ALLOWING THE WRIT

A. Introduction: The Comptroller's construction of "visitorial" is clearly unreasonable.

This Court has reiterated that:

> "It is settled that courts should give great weight to any *reasonable* construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.'" *Clarke v. Securities Industry Assn*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct 1091, 1097 (1971)) (emphasis added).

Under the now familiar formulation, when the courts review an administrator's statutory construction, they first inquire as to whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron, U.S.A. Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837, 842 (1984). If it is, "that is the end of the matter." *Id.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In other words, "if the administrator's reading fills a gap or defines a term in a way that is reasonable in the light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *NationsBank v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813-14 (1995).

The Act, 12 U.S.C § 484, provides that national banks are not subject to state "visitorial powers," but does not define that term. The Comptroller has issued an informal interpretive rule asserting that under the Act state officials have no authority to examine or require the production of books or records from national banks, except for the limited purpose of ensuring compliance with applicable state unclaimed property and escheat laws. 12 C.F.R. § 7.6025(b) (1993). [3] And in an opinion letter, he has concluded that the legislative subpoenas are "visitorial" in nature. 1993 WL 740918 (OCC Opinion Letter, June 3, 1993).

This sweeping construction, which prohibits nearly all state officials--including Texas legislators--from compelling information

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[3] The agency adopted this interpretation in 1983. *See* 48 Fed. Reg. 3936 (1983). Essentially treating it as an informal interpretive rule, the agency gave interested parties neither notice of the proposed rule, nor opportunity to comment, as required for substantive rules under the Administrative Procedure Act. *See* 5 U.S.C.A. §§ 500, 553 (West 1977).

from a national bank, is clearly unreasonable for several reasons. First, it disregards the states' strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, states have a legitimate interest in enacting laws to protect the rights and interests of their consumers, businesses, and communities.

Second, the Comptroller's novel interpretation of "visitorial" simply has no antecedent in the federal statute, the case law, the common law, or in common usage. The Comptroller has arbitrarily departed from definitions and concepts consistently and repeatedly expounded on in the English common law and throughout the history of American jurisprudence. "Permissible construction" should not be so elastic as to allow an agency to invent a new definition for a well-established term.

Finally, the Comptroller has given congressional *ambiguity* a construction which divests state legislatures of their power to issue subpoenas. But only clear and unmistakable language in the statute itself can support such preemption.

B. It is undisputed that the regulation of banking is one of dual control; the Comptroller's construction therefore threatens the proper balance of state and federal power in the field of national banking.

Although there is little doubt that Congress could exercise its commerce power to exclude state control over national banks, it

has not done so. Indeed, regulation of national banking has been one of dual control since passage of the first National Bank Act in 1863. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (repealed 1864) (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1995). In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

As this Court recognized in *McClellan v. Chipman*, 164 U.S. 347 (1896), "National Banks . . . 'are governed in the daily course of business far more by the laws of the state than of the nation.'" *Id. at 356* (*quoting National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)). Their right to contract, collect debts, and acquire and transfer property are all based on state law. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), Chief Justice Stone wrote, "[t]his Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."[4]

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[4] In fact, in *Anderson National Bank v. Luckett*, 321 U.S. at 242, the Supreme Court specifically rejected an argument by the OCC, as *amicus curiae*, as to the broad preemptive effect of the National Bank Act.

As recently as last year, Congress reaffirmed in the Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal"), the states' continuing regulatory authority over national banks in the areas community reinvestment, consumer protection, fair lending and the establishment of intrastate branches. *See* Pub. L. No. 103-328, § 102(b) 108 Stat. 2338 (1994) (amending 12 U.S.C. § 36).

Congress emphasized in the legislative history to Riegle-Neal that states have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, states have a legitimate interest in protecting the rights of their consumers, businesses, and communities. *See* Conf. Rep. to Accompany H. R. 3841, H. Rep. 651, 103rd Cong., 2d Sess. 53 (1994). [5]

The Comptroller's interpretive rule and opinion letter threaten this balance of state and federal power in the field of

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[5] Congress also created new procedural safeguards in Section 114 of Riegle-Neal to apply when such agencies attempt, by way of informal interpretive rule or opinion letter, to preempt state laws regarding community reinvestment, consumer protection or fair lending. *See* Pub. L. No. 103-328, 108 Stat. 2338 (1994). Section 114 of the Act, which amends 12 U.S.C. § 21, *et seq.*, now requires that the agency publish in the Federal Register notice of the interpretive rule the agency is considering, and consider any comments received in formulating the final rule or opinion letter. The amendment reflected congressional concern over "inappropriately aggressive" preemption by federal banking agencies. *See* Conf. Rep. to Accompany H.R. 3841, H. Rep. 651, 103rd Cong., 2d Sess. 53-54 (1994).

national banking, because they impede the efforts of state legislators to inform themselves about the very areas in which they are empowered to legislate. The authority to gather information--to compel its production if need be--is an essential tool of legislative bodies.

C. The Comptroller's interpretive rule wrenches the term "visitorial" from its plain historic meaning; "permissible construction" does not allow an agency to invent a new definition for a well-established term.

Moreover, the Comptroller has arbitrarily departed from the well-established definitions of visitorial power. Under these definitions, visitorial authority has meant the power *to enforce* laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter. Section 484 derives almost unchanged from § 54 of the National Bank Act of 1864. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1994)). When Congress first passed the 1864 National Bank Act, the definition of "visitorial" was firmly embedded in the common law. *See Dartmouth College v. Woodward*, 7 U.S. (4 Wheat. 673) 518 (1819) (Story, J.); *Allen v. McKean*, 1 F. Cas. 489, 497 (C.C.D. Me. 1833).[6]

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[6] The term "visitorial" appeared in England at least as early as the sixteenth Century. It was used to refer to "a visit of inspection made by one or more persons having civil authority or jurisdiction or specially appointed to exercise supervision within a certain sphere." OXFORD ENGLISH DICTIONARY, vol. II, 3643 (Compact ed. 1971). Blackstone also discussed the term in some detail. 1 WILLIAM BLACKSTONE, COMMENTARIES 467-468 (1979 reprint of 1765

Since then, state and federal courts interpreting the language in § 484 of the Act have applied the narrow common law definition of "visitorial." *See Guthrie v. Harkness*, 199 U.S. 148, 156-58 (1905) (inspection of bank records by shareholder held not to be visitorial); *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881) (county tax audit held not to be visitorial); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749, 751 (7th Cir. 1945) (subpoena by Office of Price Administration for bank records held not to constitute exercise of visitorial power), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.) (NLRB subpoena requesting bank records held not to constitute exercise of visitorial power), *cert. denied*, 326 U.S. 731 (1945); *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105-106 (D.C. Cir. 1939) (SEC subpoenas for information regarding, *inter alia*, bank lending practices held not to constitute exercise of visitorial power); *Peoples Bank v. Williams*, 449 F.Supp. 254, 258-259 (W.D. Va. 1978) (SEC subpoena for bank records held not to constitute exercise of visitorial power); *FTC v. Rockefeller*, 441 F.Supp. 234, 243 (S.D.N.Y. 1977) (FTC subpoenas for bank records held not to constitute exercise of visitorial power); *Best v. United States Nat'l Bank*, 739 P.2d 554,

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ed.) ("I proceed therefore next to enquire, how these corporations may be *visited*. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, enquire into, and correct all irregularities that arise in such corporations.") (emphasis in original).

563 (Or. 1987) (class action by depositors to inspect bank records to determine whether NSF charges 'cost justified' and consistent with state contract law held not to constitute exercise of visitorial power); *State v. First Nat'l Bank*, 313 N.W.2d 390, 392-395 (Minn. 1981) (examination of records of national banks by state treasurer to enforce state unclaimed property laws held not to constitute exercise of visitorial power); *Clovis Nat'l Bank v. Callaway*, 364 P.2d 748, 756 (N.M. 1961) (enforcement of New Mexico unclaimed property law against national banks held not to constitute exercise of state visitorial power); and *State v. First Nat'l Bank of Portland*, 123 P. 712, 714-716 (Or. 1912) (audit by Oregon Attorney General to enforce escheat laws to unclaimed bank deposits held not to be visitorial).

Plainly, none of the powers wielded by the Legislative Committee are visitorial in nature. Neither the Committee, nor for that matter, the Texas Legislature as a whole, has the power to prosecute violations of law, the power to audit the books and records of a corporation, the power to bring an action for forfeiture of a corporate charter, or the power to place the assets of a corporation in receivership. The Committee can only conduct studies and propose legislation to the full House. The Committee's subpoena power to compel testimony and the production of documents relates only to its need to properly inform itself in the drafting and proposing of legislation. A legislative subpoena is not an exercise of visitorial power.

Just as compelling, Congress has never sought to amend the language in § 484 to repudiate the courts' long-standing interpretation. As recently as 1982, Congress amended section 484 adding subsection (b) to expressly permit examinations by state auditors with respect to unclaimed property. *See* S. REP. No. 536, 97th Cong., 2nd Sess. 29 (1982) *reprinted* in 1982 U.S.C.C.A.N. 3054, 3083. Had Congress wished to overturn one hundred years of case law interpreting the statute, it surely could have done so. Instead, Congress continued to rely on a term of art--"visitorial"--which has a specific meaning as set out in a long line of cases. The new subsection (b) did nothing to change the meaning of "visitorial"; rather, it simply accompanied extensive new provisions clarifying the law of unclaimed deposits for bank insurance purposes. *See* S. Rep. No. 536, 97th Cong., 2nd Sess. 29 (1982) *reprinted* in 1982 U.S.C.C.A.N. 3054, 3083.

The Comptroller's cavalier interpretation of section 484 also alters the common law meaning of the term "visitorial," even though statutes are not to be construed in derogation of the common law, absent clear legislative intent. *See United States v. Texas*, 113 S.Ct 1631, 1634 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an

unequivocal statement of its purpose would have been made."); *see also In re Mark Anthony Constr.*, 886 F.2d 1101, 1107 (9th Cir. 1989); *Deaton v. Dreis and Krump Mfg. Co.*, 134 F.R.D. 219, 225-226 (N.D. Ohio 1991) ("[s]tatutes in derogation of the common law, such as this one, are to be strictly construed").

While administrative agencies charged with enforcement of a regulatory statute enjoy considerable discretion in construing or interpreting its terms, such discretion should not include the option of creating a wholly new meaning for a well-established term. The Comptroller's novel interpretation of "visitorial" presents the important federal question of how much latitude is to be afforded expert administrators in construing ambiguous terms, particularly when their construction preempts traditional state powers.

D. Preemption of the legislative subpoenas is also inconsistent with the plain statement rule in *Gregory v. Ashcroft*.

1. The issuance of legislative subpoenas is clearly an exercise of state sovereignty of the most fundamental sort.

Finally, the Comptroller has given congressional *ambiguity* a construction which divests the states of one of their core powers. As the decision of their legislatures to issue subpoenas is among those decisions fundamental to the sovereign states, only clear and unmistakable language in the statute itself can support preemption. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court addressed the

question of whether the federal Age Discrimination in Employment Act preempted a Missouri constitutional provision that "[a]ll judges other than municipal judges shall retire at the age of seventy years." It held that before a finding of preemption could be made, Congress had to make its intention to preempt "unmistakably clear in the language of the statute." *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

This requirement turned on the Court's conviction that the power to establish the qualifications of those who would govern was among the state decisions that "go to the heart of representative government." *Id.* at 461. Addressing the state constitutional provision before it, the Court explained:

> [I]t is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who would exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Id. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)).

Gregory, however, did not elaborate on how the lower courts are to determine whether a particular state decision is among those of the most fundamental sort for a sovereign entity, and

several Circuits have refused to apply the rule on the grounds that the preempted state decision did not lie at "the heart of representative government." *See First Gibraltar Bank, FSB, v. Morales*, 19 F.3d 1032, 1040 (5th Cir.) (holding state property laws were not state decisions of the most fundamental sort), *cert. denied*, 115 S.Ct. 204 (1994), *vacated on other grounds*, 42 F.3d 895 (5th Cir. 1995); *Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir. 1993) (holding that federal requirement that states pay overtime to police officers did not "strike at the heart of representative government" (internal quotations omitted)), *cert. denied*, 114 S.Ct. 1187 (1994); *Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993) (holding that *Gregory's* "plain statement rule" did not apply to state mandatory retirement laws pertaining to police officers), *cert. denied*, 114 S.Ct. 1832 (1994).

The majority's opinion in *Gregory* includes an impassioned disquisition on the benefits bestowed and liberties secured by our federalist structure of dual sovereignty. *Gregory*, 501 U.S. at 456-65. So it is doubtful this Court intended the plain statement rule to be limited to the particular facts of that case. Yet, if the work of a state legislative committee, and its decision to investigate the availability of credit in rural areas, is not an exercise of state sovereignty of the most fundamental sort, it is difficult to see how *any* state decision, other than the one specifically at issue in *Gregory*, would be fundamental enough to require "unmistakably clear" preemptive language in the federal statute. The Legislative

Committee's petition therefore presents this Court with an opportunity to amplify its holding in *Gregory*. The compelling issue of how and when the courts are to apply the plain statement rule in *Gregory* militates for granting the writ.

2. Interpretive rulemaking that preempts a core state power is inconsistent with *Gregory v. Ashcroft*.

Gregory did not involve preemptive agency rulemaking, but rather, the federal statute itself. It therefore left unanswered the question of whether an ambiguous federal statute can be construed by an agency administrator to preemptively deprive the states of one of their core powers. Because the case clearly stands for the principle that congressional silence or ambiguity will not support preemption of state decisions that go to the heart of representative government, it should necessarily follow that an agency cannot supply the clarity that is lacking in the statute itself. To hold otherwise would eviscerate *Gregory*. If agencies *can* preempt fundamental state decisions, the critical question then becomes whether such rulemaking is subject to the "permissible construction" standard of review in *Chevron* or whether greater scrutiny by the Courts is warranted.

It is of compelling importance to our federalist system that this Court address the application of the plain statement rule in the context of agency rulemaking. *Gregory* is, first and foremost, a necessary corollary to the largely deferential posture toward congressional preemption of state law articulated by this Court in

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (5-4 decision). Under the reasoning of *Garcia*, the "built-in restraints" of state participation in the national political process "ensure that laws that unduly burden the States will not be promulgated." *Id.* at 556.

But of course, as *Gregory* teaches, this rationale will be valid only if the preemptive effect of proposed legislation is clear and unambiguous. If an *ambiguous* or *silent* federal statute is later interpreted by an agency administrator to override state sovereignty, and if the Courts see themselves as constrained to give "controlling weight" to such agency action, the states will lose the slender procedural guarantee identified in *Garcia*. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-25, at 480 (2nd Ed. 1988) ("to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests") (emphasis in original); *The Supreme Court, 1987 Term--Leading Cases*, 102 HARV. L. REV. 143, 296 (1988) ("A rule that distills displacement of state law from congressional *silence* divests states of even *Garcia's* slender procedural guarantee") (emphasis in original); *see also Welch v. State Dep't. of Highways & Public Transp.*, 780 F.2d 1268, 1276 (5th Cir. 1986) (Higginbotham, J., specially concurring) (if a statute containing ambiguity regarding its preemptive effect is subsequently construed by a court to override

state sovereignty, the states will "have been effectively sandbagged"), *aff'd*, 483 U.S. 468 (1987).

In *California State Board of Optometry v. FTC*, 910 F.2d 976, 981-982 (D.C. Cir. 1990), the Court of Appeals reviewed and expressly rejected rulemaking by the FTC preempting California's laws regulating optometrists, holding that an ambiguous statute could not be construed by an agency to preempt state sovereignty. The Court wrote:

> Were we to defer to [the agency] construction and uphold [the rule] in the face of congressional silence, we would short-circuit the protections offered States by the political process. . . . The clear statement doctrine leaves no room for inferences. An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.

Id. at 981-982 .

At issue here is whether administrative agencies may engage in preemption by stealth--that is, giving a state-displacing construction to congressional *ambiguity*, and in doing so, evading the very procedure for lawmaking *Gregory* and *Garcia* relied on to ensure the states are not unduly burdened by federal law. Forcing the states to guess at whether proposed national legislation might lend itself to a "permissible construction" that divests them of one of their core powers, clearly threatens the proper balance of state and federal power. The Comptroller, through informal rulemaking and private opinion letters, has attempted to preempt state

legislative subpoenas; yet the states and those who would represent their interests in the national government were effectively denied any input prior to the adoption of this ill-advised interpretation.

CONCLUSION

The State Representatives' petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

L. P. PATTERSON, et al., *Petitioners,*

v.

NATIONSBANK OF TEXAS, N.A., et al., *Respondents.*

consolidated with

L. P. PATTERSON, et al., *Petitioners,*

v.

BANK ONE, TEXAS, N.A., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI, APPENDIX

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NATIONSBANK TEXAS, et al.

Plaintiffs-Appellees,

v.

L. P. PATTERSON, et al.,

Defendants-Appellants.

consolidated with

No. 94-11130

BANK ONE TEXAS, et al.

Plaintiffs-Appellees,

v.

L. P. PATTERSON, et al.,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10993

Appeals from the United States District Court
for the Northern District of Texas

(3:93-CV-1107-G & 3:93-CV-1081-G)

Before POLITZ, Chief Judge, WISDOM and STEWART, Circuit Judges.

PER CURIAM:*

L. P. Patterson, et al., appeal the grant of adverse summary judgment in these consolidated matters. Having considered the briefs and oral arguments of counsel and pertinent parts of the record, and finding neither error nor abuse of discretion, the judgments appealed are AFFIRMED.

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* Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BANK ONE, TEXAS, N.A., et al.,
Plaintiffs,

v.

L. P. PATTERSON, et al.,
Defendants.

No. 3:93-CV-1081-G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

September 9, 1994

MEMORANDUM ORDER

Before the court is the motion for summary judgment of plaintiffs Bank One Texas, N.A., Harvey Mitchell, and Ronald Steinhart.[1] Also before the court is the defendants'[2] motion for summary judgment.[3] For the reasons stated below, the plaintiffs'

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[1] Plaintiff Harvey Mitchell ("Mitchell") is the Chairman of Bank One Texas, N.A. ("Bank One") and plaintiff Ronald Steinhart ("Steinhart") is its President. Complaint and Application for Temporary Restraining Order ¶¶ 2-3.

For convenience, Bank One, Mitchell, and Steinhart will be referred to collectively as the "plaintiffs."

[2] The defendants are the following member of the Texas House of Representatives' Committee on Agriculture and Wildlife Management: L.P. Patterson, Charles Finnell, Elton Bomer, Renato Cuellar, Bernard Erickson, Allen Hightower, Mary Denny James, Jerry Johnson, Bob Rabuck, David Swinford, and Bob Turner. For Convenience, they will be referred to collectively as the "Committee" or the "defendants."

[3] Also, the United States and the Texas Bankers Association have filed briefs as amici curiae, which have been duly considered.

motion for summary judgment is granted and the defendants' motion for summary judgment is denied.

I. BACKGROUND

On May 24, 1993, the Committee issued the legislative subpoenas (the "subpoenas") as issue in this case. Complaint and Application for Temporary Restraining Order (the "complaint") ¶18; *id.* - Exhibits A & B. The subpoenas purport to require Mitchell and Steinhart to give testimony in a "hearing regarding lending practices toward agricultural and small business interests in rural and urban Texas." *Id.* - Exhibits A & B.

On June 4, 1993, the plaintiffs filed the instant action alleging that the subpoenas violate federal law. *See* Complaint ¶¶18, 26, 32, and 34. Subsequently, the parties agreed that the validity of the subpoenas is a question appropriate for disposition as a matter of law and that the matter should be presented to the court by way of cross-motions for summary judgment. *See* Order dated June 15, 1993.

II. ANALYSIS

Plaintiffs assert that the Committee's subpoenas violate federal law, specifically, 12 U.S.C. § 484 ("§ 484").[4] A state law

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[4] Section 484 provides:

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or as such shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at

cannot stand when it "conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiencies of these agencies of the federal government to discharge the duties for the performance of which they were created." *Davis v. Elmire Savings Bank*, 161 U.S. 275, 283 (1896). That is, "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

An interpretive ruling issued by the Office of the Comptrolier of the Currency (the "OCC") regarding § 484 is central to this court's analysis. According to the OCC,

> The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. See 12 U.S.C. 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. . . .

12 C.F.R. § 7.6025 ("§ 7.6025") (1993).

Because Congress has not "directly spoken to the precise question at issue", i.e., whether the subpoenas involved in this case constitute an exercise of visitorial

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reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

powers within the meaning of § 484, the court must determine whether the OCC's interpretive ruling regarding § 484 "is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See Department of Banking and Consumer Finance of State of Mississippi v. Clarke*, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (a court must "uphold the Comptroller's determination if [it is found] to be a 'permissible construction' of the National Bank Act") (citations omitted); *Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04 (1987).[5] Further, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11 (citations omitted).[6]

After careful review, the court has concluded that the Comptroller's construction of § 484 is a permissible one. The court has also determined that the subpoenas at issue are

---

[5] The Court stated:

> It was settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Clarke v. Securities Industry Association, 479 U.S. 388, 403-04 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971)).

[6] The defendants' challenge to the applicability of this standard of deference is wholly unpersuasive. *See* Defendants' Reponse to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment at 15-17.

clearly within the purview of § 484 and § 7.6025. First, the subpoenas contemplate the production, examination, and inspection of the books and records of Bank One. See Complaint at Exhibits A & B; § 7.6025. Second, the subpoenas are concerned with Bank One's lending practices toward agricultural and small business interests in rural and urban Texas, Exhibits A & B to the Complaint, not with "ensuring compliance with applicable State unclaimed property and escheat laws." § 484; § 7.6025. Thus, the subpoenas constitute an attempt to exercise visitorial powers within the meaning of § 484 and would, if enforced, violate the law.[7] The plaintiffs are therefore entitled to a permanent injunction prohibiting enforcement of the subpoenas at issue.

III. CONCLUSION

For the reasons stated, the plaintiffs' motion for summary judgment is **GRANTED** and the defendants' for summary judgment is **DENIED**.

Within fifteen days of this date, counsel for the plaintiffs shall submit a proposed form of judgment consistent with this memorandum order.

SO ORDERED.

September 9, 1994.

/s/

A. JOE FISH
United States District Judge

---

[7] To have any meaning, this ruling must also necessarily preclude the taking of testimony regarding the documents puportedly subject to the subpoenas.

1993 WL 740918

(OCC Interpretive Letter, June 3, 1993)

Comptroller of the Currency

Administrator of National Banks

Washington, D.C. 20219

June 3, 1993

Steven Alan Bennett
General Counsel and Secretary
Bank One, Texas, NA
1600 Pacific Avenue
Dallas, Texas 75201

Dear Mr. Bennett:

This is in response to your letter of May 28, 1993, asking for our opinion concerning certain subpoenas issued by the Agriculture Committee of the Texas House of Representatives. The subpoenas seek detailed information relating to the lending policies and practices of your Bank, to be found in the books and records and related materials of the Bank.

For the reasons given below, it is our firm conclusion that this represents an attempted exercise of visitorial powers by the state authorities which conflicts with and is therefore preempted by 12 U.S.C. 484, the federal statute which specifies and limits the circumstances wherein the books and records of national banks may be examined.

National banks are federal instrumentalities, created for a public purpose, and subject to paramount federal law. *See*, e.g., *First Nat. Bank v. Dickinson*, 396 U.S. 122 (1969); *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896). National banks must generally comply

with state laws but only to the extent that those laws do not conflict with federal law or regulation, frustrate the purposes for which national banks were created, or impair their efficiency in the discharge of their statutory duties. *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896); *Anderson Nat. Bank v. Luckett*, 321 U.S. 233 (1944). The conflict with federal law posed by the state subpoenas in the situation under discussion is clear and direct.

Ever since the passage of the National Bank Act in 1864, Congress has included an express statement narrowly restricting outside access to information contained in the internal files and reports of national banks. The limitation on visitorial powers is now contained in 12 U.S.C. 484, which provides:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Notice that the exercise of visitorial powers must be authorized by federal law.

The Office of the Comptroller of the Currency ("OCC") has issued Interpretive Ruling 7.6025(b), 12 C.F.R. 7.6025(b), which explains the visitorial powers limitation as follows:

> (b) Visitorial powers. The exercise of visitorial powers over national banks is vested in the Comptroller of the

> Currency. See 12 U.S.C. 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. Federal law provides special procedures for verifying payroll records for unemployment compensation purposes (26 U.S.C. 3305(c)), for enforcing the Fair Labor Standards Act (29 U.S.C. 211), and for ascertaining the correctness of Federal tax returns (26 U.S.C. 7602).

The concept of visitation embodied in 12 U.S.C. 484 has been described as an act of a superior examining into a corporation's conduct of its business, an action of "inspection; superintendence; direction; regulation." *First Nat. Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C. Ohio 1881), appeal dismissed 106 U.S. 523. *See also Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978) (visitorial powers involves the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs); *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980) (visitorial powers include the inspection or review of a bank's books and records).

The clearest expression concerning the exclusive nature of the visitorial powers conferred on the OCC appears in *Guthrie v. Harkness*, 199 U.S. 148 (1905):

> The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and

> examiners appointed by him. . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except insofar as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

The validity of this interpretation was reiterated in *Kelly v. Harrisburg Nat. Bank*, 44 Dauphin Co. Rep. 174, 30 D. & C. 535 (1937), and in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980). In *Kelly v. Harrisburg Nat. Bank*, the state court held that the Pennsylvania Secretary of Revenue could not examine certain records of a national bank to determine the tax liability of its customers because the relation between the bank and its depositors is confidential and "the character of the examination demanded ... would seem to constitute the exercise of visitorial power prohibited by Congress."

In *National State Bank v. Long*, the Third Circuit Court of Appeals reviewed the applicability of New Jersey's anti-redlining statute to national banks. While the court held that the nondiscrimination requirements were not preempted by federal law, it invalidated the enforcement, subpoena, and supervisory powers granted to the New Jersey Banking Commissioner as applied to national banks. The OCC, it said, possessed the exclusive authority to examine for compliance with the state law.

There have been instances when investigations through the use of subpoena power into the affairs of a national bank by government agencies other than the OCC have been upheld against a challenge brought under 12 U.S.C. 484. With one exception, however, these cases involved a federal government agency engaged in law enforcement activities authorized by Congress. *Bank of America Nat. Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939); *Bowles v. Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945); and *Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978).

The exception was *Minnesota v. First Nat. Bank of St. Paul*, 313 N.W.2d 390 (S.Ct. Minn. 1981), a state court decision supporting a state agency's proposed examination of national bank records, discussed in detail below.

Bank of America and *Peoples Bank* both addressed investigations by the Securities and Exchange Commission into alleged securities law fraud, and *Bowles* enforced a subpoena issued by the Price Administrator seeking records of four depositors at a national bank during World War II. In *Bowles* the court found that the subpoena for bank depositor records involved an exercise of visitorial powers authorized by law, by Congress, and by the court, each of which was a basis for inquiry permitted by the terms of 12 U.S.C. 484. *Bank of America* and later *Peoples Bank* concluded not only that the SEC was engaged in permissible investigatory activities, but also that its request for records in the circumstances outlined did not constitute the exercise of visitorial powers. This was effectively dictum since in any event the SEC's investigation was one "authorized by law", which would satisfy the requirements of 12 U.S.C. 484.

Minnesota v. First Nat. Bank of St. Paul, the decision mentioned above which allowed the State Treasurer to review national bank records to determine the bank's compliance with the state's unclaimed property law, stands as an anomoly. The court concluded that the Treasurer's limited investigation was not an exercise of visitorial powers within the meaning of 12 U.S.C. 484 that Congress intended to preempt. In response to this 1981 decision, Congress the following year revised 12 U.S.C. 484 in two ways.

Until 1982 the statute had permitted the exercise of visitorial powers "as authorized by law". In 1982 Congress revised the statute to read "as authorized by Federal law", to clarify that only Congress, and not the states, could create exceptions to the OCC's exclusive visitorial powers with respect to national banks. Secondly, the Congress added 12 U.S.C. 484(b) as a new subsection, authorizing state officials in specified circumstances to review a bank's records if there was reasonable cause to believe that the bank had failed to

comply with the state's unclaimed property or escheat laws. This action demonstrated that the Congress, contrary to the court in *Minnesota v. First Nat. Bank of St. Paul*, considered a review of bank records, even for a narrow or specific law enforcement purpose, to amount to an exercise of visitorial powers.

In sum, we do not believe that the Bank is required to comply with the subpoenas in question. This attempted exercise of visitorial power by local officials is not "authorized by Federal law", conflicts with the express terms of 12 U.S.C. 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

I trust that this reply is responsive to your inquiry.

Sincerely yours,

/s/
William P. Bowden, Jr.
Chief Counsel

1993 WL 639366

(OCC Interpretive Letter 616, February 26, 1993)

February 26, 1993

This letter responds to your request for a legal opinion regarding whether federal law would preempt the state filing requirement found at chapter 140, section 114C of the Massachusetts statutes as applied to national banks. This section requires credit card issuers to report quarterly, to the Massachusetts Commissioner of Banks, the finance charge rate and other fees charged to Massachusetts cardholders during the quarter, as well as the conditions under which a finance charge may be imposed. [FN1] For the reasons discussed below, I agree that the reporting requirement in this statute is preempted by federal law.

The Office of the Comptroller of the Currency ("OCC") is authorized by federal law to appoint examiners to examine all national banks. 12 U.S.C. § 481. In addition, section 484(a) of Title 12, United States Code, ensures that: No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

The section continues by granting one exception -- that State auditors and examiners may review a national bank's records solely to ensure compliance with applicable State unclaimed property or escheat laws, but only upon reasonable cause to believe that the bank has failed to comply with such laws. 12 U.S.C. § 484(b). Another provision of federal banking law specifically allows parties other than representatives from the OCC to inspect books or records of a national bank. 12 U.S.C. § 62. This section relates to the rights of shareholders, creditors, and certain tax officials to inspect

the list of shareholders of a bank. See also 12 C.F.R. § 7.6025. Section 8(t) of the Federal Deposit Insurance Act (12 U.S.C. § 1818(t)) provides the Federal Deposit Insurance Corporation with back-up enforcement authority against insured depository institutions, including national banks. Other provisions of Federal law provide limited instances wherein national banks must follow special procedures to make available employment information for verifying payroll records for unemployment compensation purposes, 26 U.S.C. § 3305(c), for enforcing the Fair Labor Standards Act, 29 U.S.C. § 211, and for ascertaining the correctness of Federal tax returns, 26 U.S.C. § 7602. See 12 C.F.R. § 7.6025. The few specific, narrow exceptions to the visitation prohibition in 12 U.S.C. § 484(a) evidence an intent by Congress that the OCC exercise nearly exclusive visitorial powers upon national banks. The fact that the states have no general authority to examine the books, records and assets of national banks is further supported by 12 U.S.C. § 92a(c), which expressly permits state authorities a limited right of access to reports of examination prepared by the OCC relating to trust activities of national banks.

The term "visitation" has been expansively defined to include any act of a superintending official to inspect, regulate, or control the operations of a bank to enforce the bank's observance of the law. *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740 (6th Cir. 1881), appeal dismissed, 106 U.S. 523 (1883). Although there may be no comprehensive definition of "visitorial" powers, they certainly include the examination of a bank's books and records. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980). Furthermore, state-law-required registrations and investigations of national banks are "visitations" and, therefore, are preempted by federal law as an unauthorized state attempt to superintend or regulate a national bank's activities. See Letter from James F.E. Gillespie, Jr., Senior Attorney, Legal Advisory Services Division (Aug. 11, 1986) (unpublished).

The Massachusetts statute requiring card issuers to provide information to the Commissioner of Banks is a form of visitation by state authorities upon national banks issuing credit cards to residents

of the state. Based on well- established preemption principles, in my opinion, the Massachusetts statute in question is preempted by 12 U.S.C. § 484. Although national banks cannot be compelled to submit disclosures to the Commissioner of Banks, no statute, regulation or policy of the OCC would prohibit a bank from providing the information voluntarily if the bank's board of directors decides that it is in the bank's best interest to do so.

Similar types of disclosure requirements, imposed by states on national banks, have been addressed by OCC staff interpretive letters in the past. These letters also concluded that such provisions were preempted by federal law and not applicable to national banks; however, national banks could voluntarily comply. See, e.g., Letter from Mitchell G. Stern, Senior Attorney, Central District (June 26, 1989) (unpublished) (Wisconsin law requiring national banks to submit information regarding the total amount of consumer credit that the banks finance constitutes a visitation under 12 U.S.C. § 484); Letter from John G. Heimann, Comptroller of the Currency (Dec. 11, 1978) (unpublished) (Michigan statute requiring periodic reporting of lending practices preempted by 12 U.S.C. § 484 and the Home Mortgage Disclosure Act of 1975); Letter from John E. Shockey, Acting Chief Counsel (July 14, 1976) (unpublished) (Massachusetts law requiring mortgagees, who under state law must pay interest on mortgage escrow accounts, to report annually to the Commissioner of Banks the amount of net profit or loss from the investment of such accounts is inapplicable to national banks based on 12 U.S.C. § 484); Letter from Robert Bloom, Chief Counsel (May 16, 1975) (unpublished) (Proposed Florida legislation requiring financial institutions to report the interest rate charged by them to state officials for the purpose of setting an interest rate ceiling would likely not be applicable to national banks pursuant to 12 U.S.C. § 484).

I trust this reply is responsive to your request.

Sincerely,

William B. Glidden, Assistant Director
Bank Operations and Assets Division

1

The Massachusetts statute states, in pertinent part: A card issuer shall report quarterly to the commissioner the finance charge rate expressed as an annual percentage rate and the amount of any annual or other fee charged during the preceding quarter to its cardholders and the conditions under which a finance charge may be imposed, including the time period within which any credit extended may be repaid without incurring a finance charge. Mass. Ann. Laws ch. 140, § 114C (Law. Co-op. 1992). A "card issuer" is defined at section 1 of chapter 140D as "any person who issues a credit card, or the agent of such person with respect to such card." Mass. Ann. Laws ch. 140D, § 1 (Law. Co-op. 1992). A "person" is defined as "a natural person or an organization." Id. It is apparent that the literal language of the statute would include national banks that issue credit cards.

TEXAS GOVERNMENT CODE

§ 301.024. Process

(a) A general investigating committee may issue process to compel the attendance of witnesses and the production of books, records, documents, and instruments required by the committee. Any other committee may issue process if authorized by the resolution creating the committee or the rules of procedure of the creating house. A committee may issue process to a witness at any place in this state.

(b) A committee chairman shall issue in the name of the committee all subpoenas and other process as directed by the committee.

(c) If necessary to obtain compliance with a subpoena or other process, a committee may issue writs of attachment.

(d) All process may be addressed to and served by any peace officer of this state or by the sergeant at arms appointed by the committee.

(e) A witness who attends a committee proceeding or a proceeding of either house under process is entitled to the same mileage and per diem as a witness who appears before a grand jury in this state. Mileage and per diem are paid from that house's contingent expense fund or from the contingent expense fund of the committee conducting the proceeding.

UNITED STATES CODE
12 U.S.C. § 92a(c)

§ 92a. Trust powers

* * * *

(c) Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records, and assets

National banks exercising any or all of the powers enumerating in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

* * * *

UNITED STATES CODE
12 U.S.C. § 484

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

UNITED STATES CODE
12 U.S.C. § 485

§ 485. Examination of Federal reserve banks

The Board of Governors of the Federal Reserve System shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Board of Governors of the Federal Reserve System shall order a special examination and report of the condition of any Federal reserve bank.

CODE OF FEDERAL REGULATIONS
12 C.F.R. § 7.6025 (1993)

§ 7.6025 Books and records of national banks.

(a) Inspection. The only provision of Federal banking law authorizing persons other than the Comptroller of the Currency or his authorized representatives to inspect books or records of a national bank is contained in 12 U.S.C. 62, relating to the right of shareholders, creditors, and certain tax officials to inspect the list of shareholders of a bank. Production of records may, however, be required under normal judicial procedures.

(b) Visitorial powers. The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. See 12 U.S.C. 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. Federal law provides special procedures for verifying payroll records for unemployment compensation purposes (26 U.S.C. 3305(c)), for enforcing the Fair Labor Standards Act (29 U.S.C. 211), and for ascertaining the correctness of Federal tax returns (26 U.S.C. 7602).

(c) Reports of examination. The report of examination made by an examiner selected by the Comptroller of the Currency is designated for use in the supervision of the bank. The bank's copy of the report is the property of the Comptroller of the Currency and is furnished to the bank solely for its confidential use. The bank's directors, in

keeping with their responsibilities both to depositors and to stockholders, should thoroughly review the report. However, under no circumstances shall the bank, or any of its directors, officers, or employees disclose or make public in any manner, the report or any portion thereof to any person or organization not officially connected with the bank as officer, director, employee, attorney, auditor, or independent auditor. Accordingly, such report shall not be made available to other banking institutions in connection with proposed transactions such as mergers and consolidations. Similarly, such report shall not be made available to a clearing house association. However, this Office has no objection to the voluntary disclosure by a bank of information concerning its affairs to such association where such disclosure is through reports prepared by the bank or by others at the request of the bank. See § 4.18 of this chapter.

No. 95-924

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

L.P. PATTERSON, et al.,

Petitioners,

v.

NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE,

Respondents.

and

L.P. PATTERSON, et al.,

Petitioners,

v.

BANK ONE, TEXAS, N.A., HARVEY MITCHELL AND RONALD STEINHART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE IN OPPOSITION

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QUESTIONS PRESENTED

Does 12 U.S.C. § 484 prohibit the Texas House of Representatives' Committee on Agriculture and Livestock from conducting an extensive review and inspection of the books and records of a national bank?

The Comptroller of the Currency has construed 12 U.S.C. § 484 to prohibit the extensive review and inspection sought by the Committee. Is the OCC's construction permissible and therefore entitled to deference by the courts?

LIST OF PARTIES

Pursuant to Rule 29.6, the following names are added to the list of parties appearing at pages (ii) and (iii) of the Petition for Writ of Certiorari:

NationsBank Corporation
NationsBank Texas Corporation
NationsBank Texas Bancorporation

These corporations are parent companies of Respondent NationsBank of Texas, N.A., which has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The judgment of the Court of Appeals and the Memorandum Opinion of the District Court, both unpublished, are reproduced at pages A-1 through A-7 of the Appendix to the Petition for Writ of Certiorari. The judgment of the District Court as to NationsBank of Texas, N.A., Timothy P. Hartman, and Robert B. Lane is reproduced at page A-1 of the Appendix to this brief.

STATUTES AND REGULATIONS INVOLVED

This case involves 12 U.S.C. § 484 and 12 C.F.R. § 7.6025 (1993), which are reproduced at pages A-20 and A-22 of the Appendix to the Petition for Writ of Certiorari, and an OCC Opinion Letter dated June 4, 1993, which is reproduced at page A-3 of the Appendix to this brief.

STATEMENT OF THE CASE

In May 1993, a meeting of the Texas House of Representatives' Committee on Agriculture and Livestock was convened by the Committee's Chairman, Representative L.P. Patterson. [R(2) p. 83] At this meeting, which lasted one minute, Representative Patterson successfully moved the Committee to authorize the issuance of legislative subpoenas directed to NationsBank, its Chairman, and its President (collectively "NationsBank"). [R(2) p. 83] The

express purpose of the subpoenas was to require NationsBank to provide information and documents relating to its "lending practices in Texas." [R(2) p. 83]

Shortly after the Committee's meeting, two subpoenas were served upon NationsBank. [R(2) p. 90] They purported to require NationsBank to produce for the Committee's inspection an enormous amount of information pertaining to virtually every aspect of NationsBank's lending practices and procedures. For example, the subpoenas would have required NationsBank to produce information concerning each of the more than 300,000 loans that NationsBank had outstanding in Texas, to provide NationsBank's proprietary credit policy and loan procedures manuals for inspection by the Committee, and to gather and produce loan files for tens of thousands of loans. [R(2) pp. 105, 90] The subpoenas also purported to require the two highest-ranking NationsBank officers to appear before the Committee and give testimony concerning NationsBank's lending practices. [R(2) pp. 90 &92] Compliance with the subpoenas would have required more than 70,000 hours of employee time and cost millions of dollars. [R(2) pp. 105-06]

The Petition for Writ of Certiorari attempts to leave the impression that the subpoenas served upon NationsBank were the result of some sort of legitimate legislative concern. *See* Petition pp. 3-4. This is not an accurate portrayal of the situation. The Committee was created to deal with matters such as agriculture and livestock, not bank lending practices. [R(2) p. 129] It is also apparent that the subpoenas were not really the work of the Committee as a whole, but rather just of Representative Patterson. The subpoenas were issued on his motion during

a one minute meeting, not after deliberation and discussion among the Committee. [R(2) p. 83] Not one Committee member or legislator other than Representative Patterson has submitted an affidavit in support of the subpoenas or, as far as the record reflects, participated at all in this litigation.

In truth, the subpoenas were part of what can only be described as a one-man campaign against NationsBank. Since 1988, Representative Patterson has called for two investigations of NationsBank and has introduced five unsuccessful bills that would have imposed special taxes and reporting requirements upon NationsBank. [R(2) pp. 26-42] Representative Patterson has also issued a number of public statements concerning NationsBank:

> "With all of the financial institution takeovers by out-of-state corporations such as NCNB, one half of our depository funds are controlled by these large corporations."
>
> "The activities of holding companies should be curbed to prevent inordinate money in flight. If the federal government won't do it, states will."
>
> "NCNB is flat raping the state"
>
> "NCNB carpetbags Texas"
>
> "We can and must do something . . . including passing bank reform measures. We don't have to let these things continue, and we don't have to rely on uncaring Federal regulators, who were and are a large part of the problem."

[R(2) pp. 63, 71, 81, 45, 46]

It is wrong for the Petition, as part of an effort to obtain review by this Court, to pretend the subpoenas are

something they are not. They are the work of a single individual who desires to conduct an inquisition into the lending activities of a national bank, they seek to accomplish by subpoena what that individual could not accomplish by legislation, they are drafted to create the greatest possible burden and expense for NationsBank, and they are discriminatory, having been served upon only two of the more than 1,000 banks in Texas. [R(2) p. 90]

Upon receiving the subpoenas, NationsBank brought suit seeking a declaratory judgment that the subpoenas were prohibited and preempted by 12 U.S.C. § 484, which provides as follows:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484. Because the inspection of bank books and records is a type of "visitorial power" prohibited by subsection (a), and in light of the limited state review of national bank records permitted by subsection (b), NationsBank urged that the plain language of Section 484 prohibited the subpoenas. [R(2) pp. 14-16] In addition,

NationsBank urged the District Court to give deference to an interpretive ruling from the Office of the Comptroller of the Currency (the "OCC"), and to an OCC opinion letter, both of which construed Section 484 to prohibit the subpoenas. [R(2) pp. 16-17]

The parties agreed that the validity of the subpoenas was a question appropriate for disposition as a matter of law and that the matter should be presented to the District Court by way of cross-motions for summary judgment. [R(1) pp. 23-25] The District Court granted NationsBank's motion for summary judgment, denied the Committee's cross-motion, and entered judgment in favor of NationsBank, declaring the subpoenas void and enjoining their enforcement. [R(1) pp. 239-40] The Fifth Circuit summarily affirmed. *See* Appendix to Petition p. A-2.

REASONS THE PETITION SHOULD BE DENIED

In the 131-year history of Section 484 and its predecessor statutes, we believe this case is the only time that a state legislator and a national bank have litigated a dispute under Section 484. Given the unusual circumstances giving rise to the subpoenas at issue, this case is almost sure to be the last time as well. It certainly does not present any of the "special and important reasons" necessary to justify this Court's review.

(1) The lower courts' decisions are not in conflict with other decisions and do not present an "important question"

The decisions reached by the lower courts and the legal reasoning behind them do not present any conflict with a decision of this Court or any other. In fact, the District Court's deference to the OCC's construction of Section 484 was mandated by this Court's precedents regarding the OCC's construction of other national banking laws. *See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995) (OCC's reasonable construction of banking laws is entitled to "controlling weight"); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) (reasonable construction of banking laws by OCC is entitled to great weight).

This case, being unique, also does not present an issue of importance to anyone other than Petitioners and Respondents. The Fifth Circuit concluded that its summary affirmance of the District Court's judgment "merely decide[d] [a] particular case on the basis of well-settled principles of law." Appendix to Petition p. A-2 n. One of those principles – the weight to be given the OCC's construction of national banking laws – has just recently been reaffirmed by the Supreme Court. *See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995). The Petition is merely dissatisfied with the unanimous view of the OCC, the District Court, and the Fifth Circuit concerning Representative Patterson's subpoenas, and presents no compelling reasons for this Court's review.

(2) The lower courts' decisions would be correct regardless of the outcome of the questions presented by Petitioners

Both the issues presented by Petitioners concern the reasonableness of the OCC's interpretation of Section 484 and whether the federal courts should give weight to that interpretation. *See* Petition p. i. While the lower courts' decisions on those matters were entirely correct, the issues need not be reached, because the plain language of Section 484 alone prohibits the inspection sought by the Committee and would sustain the lower courts' decisions.

In the Court of Appeals, the Committee expressly acknowledged that "[w]ithout question, 12 U.S.C. § 484 is intended to preempt state visitorial powers over national banks." Appellants' Opening Brief p. 25. And the brief implicitly acknowledged that inspection of a bank's books and records is a species of "visitorial power" within the meaning of Section 484. *See* Appellants' Opening Brief pp. 11-12 (speaking of the "visitorial power to examine corporate books and records" and "visitorial statutes which give the state access to corporate books and records"); *see also National State Bank v. Long*, 630 F.2d 981, 989 (3rd Cir. 1980) (visitorial powers "generally . . . do encompass examination of the bank's books and records"). But the Petition suggests that the inspection of bank books and records is not "visitorial" when attempted by a legislative committee, as opposed to other state officials, because neither a legislature nor a legislative committee has the "power to enforce laws." Petition p. 13.

The Committee's artificial differentiation of a state legislature from the rest of state government finds no support in the language of Section 484. In subsection (a), Congress expressly excepted from the prohibition of Section 484 the exercise of visitorial powers "by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." Congress would not have needed this exception if the actions of a legislature and its committees could not be visitorial. That Congress created the exception means that Congress must have understood the prohibited "visitorial powers" to include inspections by purely legislative bodies.

Just as telling is subsection (b), which provides that "notwithstanding subsection (a)," state authorities have the right to "review [a bank's] records *solely* to insure compliance with applicable state unclaimed property or escheat laws." 12 U.S.C. § 484(b) (emphasis added). It obviously would not have been necessary for Congress to allow "notwithstanding subsection (a)" the review of national bank records *solely* for escheat law purposes if subsection (a) did not already generally preclude the review of national bank records by state authorities.

The history of Section 484 likewise provides no support for the Committee's position. Prior to its amendment in 1982 to its current form, Section 484 provided only:

> No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484 (1876). The 1982 amendments did two significant things. First, the "except as authorized by law exception" was changed to "except as authorized by *Federal* law." 12 U.S.C. § 484(a) (emphasis added). Second, as we have discussed, the amendments added subsection (b) to describe the only circumstances under which state officials may review national bank records. Whether undertaken to clarify Section 484 or to broaden its protection against state inspections, the effect of the amendments is unmistakable: state officials may not review records of national banks except to ensure compliance with state escheat laws. Indeed, the only pertinent legislative history concerning the 1982 amendments clearly indicates Congress' intent with respect to subsection (b):

> The bill permits review of national bank records by state auditors and examiners. Such reviews of relevant documentation may be conducted *solely to determine compliance with applicable state unclaimed property or escheat laws* if such officials have reasonable cause to suspect that a bank has violated those laws.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 29 (1982) (emphasis added).

There are no judicial decisions that even hint that a state legislative committee's attempt to conduct an extensive review and inspection of national bank records is not visitorial in nature and prohibited by Section 484. There are also no cases that support the Committee's illogical argument that what would be visitorial and prohibited if attempted by state examiners, agencies, or executive officers is not prohibited if attempted by a state legislature. It is just not possible that Section 484 was intended to

protect national banks from document reviews by certain state officials, but not from identical activities undertaken by state legislators. Regardless of the OCC's interpretation, and the questions presented by the Petition, the language of Section 484 alone confirms the correctness of the lower courts' decisions.

(3) The District Court was correct to defer to the Comptroller's construction of Section 484

The OCC's interpretive ruling concerning Section 484 provides:

> The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. *See* 12 U.S.C. § 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. . . .

12 C.F.R. § 7.6025(b) (1993). In an opinion letter, the OCC has also concluded that the very subpoenas at issue in this case violate Section 484:

> In sum, we do not believe that [NationsBank] is required to comply with the subpoenas in question. This attempted exercise of visitorial power by local officials is not "authorized by Federal law," conflicts with the express terms of 12

> U.S.C. § 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

[R(2) p. 136]

The OCC is the federal agency responsible for the execution of all laws pertaining to national banks. 12 U.S.C. § 1. There is no question that the OCC's construction of Section 484, if a permissible one, must control:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.
>
> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue. If so, that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 813-14 (1995) (internal citations and quotations omitted).

The OCC's construction of Section 484 is undoubtedly reasonable and permissible. It is consistent with the plain words of the statute, and also the "comprehensive scheme" constructed by Congress in which the supervision and examination of national banks is made the exclusive responsibility of the OCC. *See, e.g.*, 12 U.S.C. § 481 (giving the Comptroller the right to conduct "thorough examination[s] of all the affairs of [a national] bank"). Such a construction also comports with pertinent legislative history concerning the 1982 amendments to Section 484. *See* S. Rep. No. 97-536, 97th Cong., 2d Sess. 29 (1982) (explaining that the bill to amend Section 484 permits the review of national bank records by state examiners "*solely* to determine compliance with applicable . . . escheat laws") (emphasis added)).

Although the Petition challenges the reasonableness of the OCC's construction, it does so only by ignoring the plain language of Section 484, and then providing a string cite of cases that are said to define the term "visitorial power" to mean only "the power to enforce laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter." Petition pp. 13 and 14. This is a horrible mischaracterization of the cases cited, not one of which supports the Committee's

assertion.[1] In fact, the one Supreme Court case cited by the Committee seems to specifically refute the idea that legislative actions cannot by definition be visitorial:

> Visitation is defined . . . as . . . the act of examining into the affairs of a corporation.
>
> * * *
>
> In the United States, *the legislature is the visitor* of all corporations created by it.
>
> * * *
>
> Congress had in mind, in passing [predecessor to Section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency. . . . It was the intention that this statute should contain a full code of provisions upon the subject,

---

[1] For example, *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749 (7th Cir. 1945), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); and *FTC v. Rockefeller*, 441 F. Supp. 234 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2nd Cir. 1979), are said to hold that subpoenas issued by various federal agencies did not constitute an exercise of visitorial powers. Petition p. 14. These cases, however, hold no such thing. In each case, the subpoenas at issue were *assumed to constitute visitorial powers* that would ordinarily be prohibited by Section 484, but were held to fall within one or more of the express statutory exceptions, primarily the "except as authorized by law [now Federal law]" exception. *See Bowles*, 151 F.2d at 751; *Northern Trust*, 148 F.2d at 29; *Rockefeller*, 441 F. Supp. at 243. If anything, these cases support NationsBank's position by indicating that subpoenas requiring the production of bank records *are* visitorial in nature and can be enforced only if one of the express statutory exceptions to Section 484 applies. None of these cases, or any others, suggest that the term "visitorial power" should be defined in the manner proposed by the Petition.

> and that *no* state law or enactment should undertake to exercise the right of visitation on a national corporation.

Guthrie v. Harkness, 199 U.S. 148, 157-59 (1905) (emphases added, internal citations and quotations omitted).

The Committee's petition also fails to acknowledge the only case decided in the last 100 years that has addressed a situation in which *state* governmental officials sought production of national bank records for *non-escheat* purposes. In *National State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980), the Third Circuit specifically found that visitorial powers "generally . . . do encompass the examination of [a] bank's books and records," and then concluded that because "the exclusivity of the power to examine" the books and records of a national bank rests with the OCC, state officials were precluded by Section 484 from examining national bank books and records for purposes of a state anti-redlining statute. *Id.* at 988-89.

No court has ever found the OCC's construction to be unreasonable or impermissible, and the lower courts were entirely correct in giving effect to that construction.

(4) The "plain statement rule" invoked by the Petition is inapplicable to this case

The Petition suggests that the "plain statement rule" described in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), precludes the OCC from interpreting Section 484 in the way that it has, and that the lower courts' decisions therefore are inconsistent with *Gregory*. *See* Petition pp. 17-23. This suggestion is incorrect and does not merit review by the Court.

The plain statement rule provides that if Congress intends to "alter the usual constitutional balance between the States and the Federal Government" by subjecting a fundamental "sovereign power" of the States to federal legislation pursuant to the Supremacy Clause, Congress must make its intent plain in the language of the statute. *Gregory*, 501 U.S. at 460-61. Thus, in *Gregory*, the Court declined to read the ADEA to preempt a state mandatory retirement age for judges in the absence of statutory language that plainly subjected those judges to the ADEA. *Id.* at 470. The plain statement rule was found applicable because "the authority of the people of the States to determine the qualifications of their most important government officials" is a power that "lies at the heart of a representative government" and is "reserved to the States under the Tenth Amendment and guaranteed them by" the Guarantee Clause of the Constitution. *Id.* at 463.

The plain statement rule has nothing to do with this case. First, as discussed above, the plain language of Section 484 does prohibit the subpoenas. But more fundamentally, the inspection of the books and records of a *national* bank obviously is not something that involves any matter of state sovereignty or seeks to alter the balance of power between States and the Federal Government. National banks are creatures of *federal* law and are subject to state law only to the extent that federal law permits:

> National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows

> that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896). The states possess no fundamental sovereign power that entitles them to conduct inspections of national banks, which are subject first and foremost to the federal law upon which their existence depends. For the Petition to invoke the plain statement rule under the circumstances of this case is backwards – this case involves not federal interference with a state sovereign power, but rather state interference with a federal matter.

CONCLUSION

This case presents no issue worthy of the Court's attention, and the decisions of the lower courts were correct and in accord with the applicable precedents of this Court. The Petition for Writ of Certiorari therefore should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE, Plaintiffs,	§	NO. 3:93-CV-1107-G
v.	§	
L.P. PATTERSON, CHARLES FINNELL, RENATO CUELLAR, ALLEN HIGHTOWER, MARY DENNY JAMES, JERRY JOHNSON, BOB RABUCK, BOB TURNER, DAVID SWINFORD, ELTON BOMER, AND BERNARD ERICKSON, Defendants.	§	(Filed Sept. 27, 1994)

JUDGMENT

Plaintiffs' Motion for Summary Judgment having been granted by the Court for the reasons set forth in the Memorandum Order filed on September 9, 1994 in *Bank One, Texas, N.A. et al. v. Patterson, et al.*, Civil Action No. 3:93-CV-1081-G, it is

ORDERED and ADJUDGED:

(1) that the Legislative Subpoenas served upon plaintiffs by defendants are prohibited and preempted by federal law and therefore are invalid;

(2) that plaintiffs need not appear, testify, or produce documents or information in response to the Legislative Subpoenas or otherwise comply with the Legislative Subpoenas;

(3) that defendants and all persons acting on behalf of defendants are permanently enjoined from directly or indirectly enforcing or attempting to enforce the Legislative Subpoenas served upon plaintiffs; and

(4) that costs of court are taxed against defendants.

Signed Sept. 27, 1994.

/s/ A. Joe Fish
A. JOE FISH
United States
District Judge

[LOGO]

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

June 4, 1993

Harry J. Grim
General Counsel
NationsBank of Texas, NA
901 Main Street
68th Floor
Dallas, Texas 75283-0142

Dear Mr. Grim:

This is in response to your recent communication asking for our opinion concerning certain subpoenas issued by the Agriculture Committee of the Texas House of Representatives. The subpoenas seek detailed information relating to the lending policies and practices of your Bank, to be found in the books and records and related materials of the Bank.

For the reasons given below, it is our firm conclusion that this represents an attempted exercise of visitorial powers by the state authorities which conflicts with and is therefore preempted by 12 U.S.C. 484, the federal statute which specifies and limits the circumstances wherein the books and records of national banks may be examined.

National banks are federal instrumentalities, created for a public purpose, and subject to paramount federal law. *See, e.g., First Nat. Bank v. Dickinson,* 396 U.S. 122 (1969); *Davis v. Elmira Savings Bank,* 161 U.S. 275 (1896). National

banks must generally comply with state laws but only to the extent that those laws do not conflict with federal law or regulation, frustrate the purposes for which national banks were created, or impair their efficiency in the discharge of their statutory duties. *Davis v. Elmira Savings Bank,* 161 U.S. 275 (1896); *Anderson Nat. Bank v. Luckett,* 321 U.S. 233 (1944). The conflict with federal law posed by the state subpoenas in the situation under discussion is clear and direct.

Ever since the passage of the National Bank Act in 1864, Congress has included an express statement narrowly restricting outside access to information contained in the internal files and reports of national banks. The limitation on visitorial powers is now contained in 12 U.S.C. 484, which provides:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Notice that the exercise of visitorial powers must be authorized by federal law.

The Office of the Comptroller of the Currency ("OCC") has issued Interpretive Ruling 7.6025(b), 12 C.F.R. 7.6025(b), which explains the visitorial powers limitation as follows:

> (b) *Visitorial powers.* The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. See 12 U.S.C. 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. Federal law provides special procedures for verifying payroll records for unemployment compensation purposes (26 U.S.C. 3305(c)), for enforcing the Fair Labor Standards Act (29 U.S.C. 211), and for ascertaining the correctness of Federal tax returns (26 U.S.C. 7602).

The concept of visitation embodied in 12 U.S.C. 484 has been described as an act of a superior examining into a corporation's conduct of its business, an action of "inspection; superintendence; direction; regulation." *First Nat. Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C. Ohio 1881), appeal dismissed 106 U.S. 523. *See also Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978) (Visitorial powers involves the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs); *National State Bank v. Long*, 630 F.2d 981 (3d Cir.

1980) (visitorial powers include the inspection or review of a bank's books and records).

The clearest expression concerning the exclusive nature of the visitorial powers conferred on the OCC appears in *Guthrie v. Harkness*, 199 U.S. 148 (1905):

> The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him. . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except insofar as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

The validity of this interpretation was reiterated in *Kelly v. Harrisburg Nat. Bank*, 44 Dauphin Co. Rep. 174, 30 D. & C. 535 (1937), and in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980). In *Kelly v. Harrisburg Nat. Bank*, the state court held that the Pennsylvania Secretary of Revenue could not examine certain records of a national bank to determine the tax liability of its customers because the relation between the bank and its depositors is confidential and "the character of the examination demanded . . . would seem to constitute the exercise of visitorial power prohibited by Congress."

In *National State Bank v. Long*, the Third Circuit Court of Appeals reviewed the applicability of New Jersey's anti-redlining statute to national banks. While the court held that the nondiscrimination requirements were not preempted by federal law, it invalidated the enforcement, subpoena, and supervisory powers granted to the New Jersey Banking Commissioner as applied to national banks. The OCC, it said, possessed the exclusive authority to examine for compliance with the state law.

There have been instances when investigations through the use of subpoena power into the affairs of a national bank by government agencies other than the OCC have been upheld against a challenge brought under 12 U.S.C. 484. With one exception, however, these cases involved a federal government agency engaged in law enforcement activities authorized by Congress. *Bank of America Nat. Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939); *Bowles v. Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945); and *Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978). The exception was *Minnesota v. First Nat. Bank of St. Paul*, 313 N.W.2d 390 (S.Ct. Minn. 1981), a state court decision supporting a state agency's proposed examination of national bank records, discussed in detail below.

Bank of America and *Peoples Bank* both addressed investigations by the Securities and Exchange Commission into alleged securities law fraud, and *Bowles* enforce a subpoena issued by the Price Administrator seeking records of four depositors at a national bank during World War II. In *Bowles* the court found that the subpoena for bank depositor records involved an exercise of visitorial powers authorized by law, by Congress, and by the court,

each of which was a basis for inquiry permitted by the terms of 12 U.S.C. 484. *Bank of America* and later *Peoples Bank* concluded not only that the SEC was engaged in permissible investigatory activities, but also that its request for records in the circumstances outlined did not constitute the exercise of visitorial powers. This was effectively dictum since in any event the SEC's investigation was one "authorized by law", which would satisfy the requirements of 12 U.S.C. 484.

Minnesota v. First Nat. Bank of St. Paul, the decision mentioned above which allowed the State Treasurer to review national bank records to determine the bank's compliance with the state's unclaimed property law, stands as an anomaly. The court concluded that the Treasurer's limited investigation was not an exercise of visitorial powers within the meaning of 12 U.S.C. 484 that Congress intended to preempt. In response to this 1981 decision, Congress the following year revised 12 U.S.C. 484 in two ways.

Until 1982 the statute had permitted the exercise of visitorial powers "as authorized by law". In 1982 Congress revised the statute to read "as authorized by Federal law", to clarify that only Congress, and not the states, could create exceptions to the OCC's exclusive visitorial powers with respect to national banks. Secondly, the Congress added 12 U.S.C. 484(b) as a new subsection, authorizing state officials in specified circumstances to review a bank's records if there was reasonable cause to believe that the bank had failed to comply with the state's unclaimed property or escheat laws. This action demonstrated that the Congress, contrary to the court in *Minnesota v. First Nat. Bank of St. Paul,* considered a review of

bank records, even for a narrow or specific law enforcement purpose, to amount to an exercise of visitorial powers.

In sum, we do not believe that the Bank is required to comply with the subpoenas in question. This attempted exercise of visitorial power by local officials is not "authorized by Federal law", conflicts with the express terms of 12 U.S.C. 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

I trust that this reply is responsive to your inquiry.

Sincerely yours,

/s/ William P. Bowden
William P. Bowden, Jr.
Chief Counsel

Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

No. 95-924

In The
Supreme Court of the United States
October Term, 1995

L.P. PATTERSON, et al.,
Petitioners,
v.
NATIONSBANK OF TEXAS, N.A.,
TIMOTHY P. HARTMAN
and ROBERT B. LANE,
Respondents.
consolidated with
L.P. PATTERSON, et al.,
Petitioners,
v.
BANK ONE, TEXAS, N.A.,
HARVEY MITCHELL
and RONALD STEINHART,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For The Fifth Circuit

BRIEF OF BANK ONE, TEXAS, N.A. HARVEY MITCHELL AND RONALD STEINHART IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HARVEY MITCHELL and RONALD STEINHART

QUESTIONS PRESENTED

1. Does the issuance and service of a broad legislative subpoena calling for practically every bank document of a national bank constitute an exercise of state "visitorial power" over a national bank that is prohibited within the meaning of 12 U.S.C. § 484(a)?

2. Is the Comptroller of the Currency's construction of 12 U.S.C. § 484, which prohibits the review and inspection of documents sought by a state legislative committee, a reasonable interpretation of the statute that is entitled to deference by the courts?

LIST OF PARTIES

Pursuant to Rule 29.1, the following names are added to the list of parties appearing at page (ii) and (iii) of the Petition for Writ of Certiorari:

BANC ONE TEXAS CORPORATION
BANC ONE CORPORATION

These corporations are parent companies of Respondent Bank One, Texas, N.A., which has no nonwholly owned subsidiaries.

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No. 95-924

In The

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L.P. PATTERSON, et al.,

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NATIONSBANK OF TEXAS, N.A.,
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BANK ONE, TEXAS, N.A.,
HARVEY MITCHELL
and RONALD STEINHART,

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF BANK ONE, TEXAS, N.A. HARVEY MITCHELL AND RONALD STEINHART IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THIS COURT:

Bank One, Texas, N.A. ("Bank One"), Harvey Mitchell and Ronald Steinhart (collectively, "Respondents") respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals is reproduced at pages A-1 through A-2 of the Appendix to the Petition for Writ of Certiorari (the "Appendix"). The unpublished opinion of the United States District Court for the Northern District of Texas is reproduced at pages A-3 through A-7 of the Appendix.

STATUES AND REGULATIONS INVOLVED

This case involves the following statute and regulation: 12 U.S.C. § 484 and 12 C.F.R. § 7.6025 (1993), which are reproduced at pages A-20 and A-22 through A-23 of the Appendix. This case also involves the following interpretive letters by the Office of the Comptroller of Currency: 1993 WL 740918 (OCC Opinion Letter, June 3, 1993), and 1993 WL 639366 (OCC Interpretive Letter 616, February 26, 1993), which are reproduced at pages A-8 through A-17 of the Appendix.

STATEMENT OF CASE

Bank One is a nationally chartered bank with its principal place of business in Dallas, Texas. The parties do not dispute that as a national bank, Bank One is entitled to protection from the exercise of visitorial powers pursuant to 12 U.S.C. § 484.

On May 24, 1993, State Representative L.P. Patterson, acting as Chairman of the Committee on Agriculture & Wildlife Management, a standing committee of the Texas House of Representatives, issued legislative subpoenas to Mr. Harvey Mitchell, Chairman of the Board of Bank One, and to Mr. Ronald Steinhart, President of Bank One, seeking both the testimony of the recipients and the production of fifteen (15) categories of documents contained in Bank One's books and records. (R.BO. 14-19, 21-26). On May 28, 1993, the subpoenas were served on Messrs. Mitchell and Steinhart through the General Counsel of

Bank One in Dallas County, Texas. (R.BO. 37). In addition to producing the requested documents, the subpoenas ordered Mr. Mitchell and Mr. Steinhart to testify "regarding lending practices toward agricultural and small business interests in rural and urban Texas." (R.BO. 14, 21).

In seeking a Writ of Certiorari, Petitioners argue that issuance of the subpoenas was merely part of a fact finding mission related to agricultural and small business lending practices and was not motivated by a desire to regulate Bank One. Petition p. 3-4. This claim is, at best, disingenuous given that Chairman Patterson has repeatedly attempted to regulate the banking industry in the State of Texas, and large national banks in particular, through the introduction of legislation, including: (1) HB 1223 in the 71st Texas Legislature, which would have required financial institutions having deposits of $250 million to file reports of their financial activities with the Texas Banking Commissioner (R.BO. 19A-20A); (2) HB 236 in the 72nd Texas Legislature, which would have imposed a tax on bank deposits in excess of $300 million, with deductions for loans made in the bank's local service area (R.BO. 22A-25A); (3) HB 537 in the 72nd Texas Legislature, which would have required quarterly reports of deposit and lending activities from banks having deposits in excess of $250 million on a branch-by-branch basis (R.BO. 26A-28A); and (4) HB 584 in the 73rd Texas Legislature, which would have required quarterly reports on a branch-by-branch basis from banks having deposits in excess of $250 million. (R.BO 29A-30A). Although each of these bills failed to pass the Texas Legislature, they reflect repeated attempts to regulate the banking industry by requiring the production of the same information sought by the subpoenas. In this respect, Chairman Patterson's issuance of the subpoenas appears to be a circuitous attempt to regulate national banks through production of their records where direct attempts to achieve this end have been consistently rejected by the Texas Legislature.

Putting aside this background, under any standard the subpoenas were extraordinary in their breadth, seeking to compel the witnesses not only to testify, but to also produce reports with underlying records related to virtually all branch lending of Bank One for thirty-two (32) separate counties for the entire first quarter of 1993.[1] (R.BO. 15, 19, 22, 26). Specifically, the subpoenas required the production of the following categories of documents from each branch location:

(1) "recaps" of all lending activity by Bank One statewide and by branch offices in 32 specified counties through the end of the first quarter of 1993, and all "back-up" detail;

(2) Bank One's credit policy manuals;

(3) Bank One's loan operations procedure manual;

(4) all written standards and definitions that explain Bank One's loan categories;

(5) all documents identifying loans purchased and notes, participations, and shared units purchased or "booked" by Bank One, detailing source location, amount, and type of loan;

(6) documents describing various codes used in Bank One's accounting books, including industrial codes, geographic codes, collateral codes and purpose codes;

---

[1] The subpoenas requested Respondents to provide information and documents for each of Bank One's branches in the following Texas counties: Abilene, Amarillo, Athens, Baytown, Brenham, Burleson, Canton, Cedar Park, Cleburne, Commerce, Corsicana, Crosby, Denton, DeSoto, Duncanville, Fredericksburg, Georgetown, Greenville, Levelland, Lewisville, Longview, Mansfield, Marshall, Midland, New Caney, Odessa, Orange, Port Arthur, Sherman, Temple, Waxahachie and Wichita Falls. (R.BO. 19, 26).

(7) documents relating to any telephone surveys of Bank One branch operations regarding small business and agricultural lending;

(8) documents identifying all agricultural and small business loans made by Bank One where the purpose of the loan was not to purchase an automobile or light truck, statewide and by branches in 32 specified counties;

(9) documents identifying all loans made by Bank One for the purchase of raw or unimproved agricultural land, statewide and by branches in 32 specified counties;

(10) documents identifying all loans made by Bank One for agricultural production; and

(11) documents identifying or summarizing Farmers Home Administration guaranteed loan applications and acceptance rates.

(R.BO. 17-19, 24-26). The unrebutted evidence before the District Court showed that much of the information sought by the legislative committee either did not exist or did not exist in the form specified in the subpoenas. (R.BO. 37, 49).

The subpoenas not only sought reports that did not exist, but also sought "detail of back-up listings on which the above recaps are based," which in effect compelled the production of almost every document created in the business of providing loans by each branch office of Bank One in thirty-two Texas counties. (R.BO. 17, 24) When coupled with the scope of the definitions contained in the subpoenas (R. BO. 16, 23), it is difficult to imagine broader and more intrusive requests for production. In this regard, the unrebutted testimony of Dan Kuster, the Senior Vice-President and Director of Corporate Planning for Bank One, offered to the District Court in support of the application for injunction, makes clear the exceptionally burdensome and expen-

sive task that would be required, as a practical matter, for Bank One to comply with the subpoenas:

> The subpoenas demand a massive amount of information. However, it should be realized that our systems contain an even greater amount of raw data. Bank One uses some forty (40) separate data systems, some of which are operated by outside contractors. We would have to search each one to locate the information requested by the subpoenas. Assuming all of the data requested currently existed in the form required and was available, Bank One would still have to expend thousands of staff-hours sifting through all of its data to collect and produce this information. The cost of such production would easily be in the tens of thousands of dollars, and could be over $100,000.00 with the cost of photocopying and reproducing the information costing in the tens of thousands of dollars.
>
> But the information requested simply does not exist in the form the Committee has demanded. For example, because Bank One is not required to report activities on a branch by branch basis under federal regulations, most information is not available on that basis. As a result, Bank One cannot provide most of the requested information in the form specified without substantial additional efforts, including fundamental and very expensive changes to its computing and reporting systems. It is even conceivable that we would need to manually sort through individual loan files to determine if such loans meet the criteria requested by the subpoenas. Bank One would have to divert hundreds of staff-hours to compile the information in the form requested, including substantial time by technicians to effect a conversion in our reporting systems. The cost of this effort could easily exceed $100,000.00.

(R.BO. 48-49). In short, it was undisputed before the District Court that to comply with the subpoenas as drafted would require

Bank One to undertake an extremely invasive, burdensome and expensive task, which would result in the production of virtually all lending records for the requested branches for the first quarter of 1993.

Upon receiving the subpoenas, Bank One filed suit seeking a declaratory judgment that the subpoenas were prohibited and preempted by 12 U.S.C. § 484, which provides as follows:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice of such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484. Because the inspection of bank books and records is a type of "visitorial power" prohibited by subsection (a), and in light of the limited state review of national bank records permitted by subsection (b), Bank One urged that the plain language of Section 484 prohibited the subpoenas. In addition, Bank One urged the District Court to give deference to an interpretive ruling from the Office of the Comptroller of the Currency ("OCC"), and to an OCC opinion letter, both of which construed Section 484 to prohibit the subpoenas.

The parties agreed that the validity of the subpoenas was a question appropriate for disposition as a matter of law and that the matter should be presented to the District Court by way of cross-motions for summary judgment. The District Court granted Bank One's motion for summary judgment, denied the Commit-

tee's cross-motion, and entered judgment in favor of Bank One, declaring the subpoenas void and enjoining their enforcement. The Fifth Circuit summarily affirmed. *See* Appendix p. A-2.

REASONS THE PETITION SHOULD BE DENIED

(1) The decision by the Fifth Circuit Court of Appeals is not in conflict with the decision of another court of appeals on the same issue and does not represent an important question of federal law.

The decision of the Fifth Circuit Court of Appeals is not in conflict with the decision of another United States court of appeals on any matter. Only one federal court of appeals has addressed the issues presented in this case and it has resolved them in a manner consistent with the decisions below. *See National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 988-89 (3rd Cir. 1980). In *National State Bank*, the Third Circuit followed an OCC interpretive ruling in holding that under 12 U.S.C. § 484 visitorial powers "encompass examination of the bank's books and records." These decisions by the Fifth and Third Circuits are consistent with this Court's recent directive that a reasonable interpretation by the OCC of a banking law should be given "controlling weight." *See Nations Bank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813-814 (1995); *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) (a reasonable construction by the OCC of the meaning of banking laws entitled to "great weight").

This case also does not present an important question of law that is proper for review by this Court. The Fifth and Third Circuit opinions are separated by sixteen years, thus reflecting the infrequency with which this issue arises. Moreover, the Petitioners are simply unhappy with the application by the Fifth Circuit and the District Court of the doctrine of the plain language of the statute, as well as established rules of deference to be given OCC interpretations of banking laws. *See e.g. Nations Bank of North*

Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S.Ct. 810, 813-14 (1995). In other words, it is not the principle of law that is at issue; it is the lower courts' application of the legal standard on the particular set of facts of this case that provides the basis for the Petition. Accordingly, Petitioners have not presented compelling reasons for review of their Petition pursuant to Sup. Ct. R. 10 and it should therefore be denied.

(2) The plain language and legislative history of Section 484 support the Fifth Circuit Court of Appeals' decision.

Although both questions presented by Petitioners relate to the reasonableness of the OCC's interpretation of "visitorial powers" under Section 484 and the standard of deference to be afforded such determinations by federal courts, these issues need not be reached because the plain language of the statute and its legislative history prohibits the inspection sought through the subpoenas, which provides a separate basis for upholding the Fifth Circuit's decision.

There is no argument between the parties on the issue of whether Section 484 preempts state law, given Petitioners' concession in the Fifth Circuit that "without question, 12 U.S.C. § 484 is intended to preempt state visitorial powers over national banks." Appellants' Brief p. 25. Petitioners argue, however, that the service of a subpoena by a legislative committee seeking virtually all lending records for thirty-two branches of a national bank in some way does not constitute an exercise of visitorial power. This argument is directly contradicted by the plain language of Section 484, which provides:

> § 484. Limitation on visitorial powers
>
> (a) *No national bank shall be subject to any visitorial powers* except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

> (b) Notwithstanding subsection (a) of this section, lawfully authorized *State auditors and examiners may*, at reasonable times and upon reasonable notice to a bank, *review its records solely to ensure compliance with applicable State unclaimed property or escheat laws* upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484 (emphasis added).

Subsection (a) clearly establishes the general rule that national banks are not subject to visitorial powers except in three narrow situations not applicable to the facts of this case.[2] Subsection (b), added by amendment in 1982, creates a further exception to the general rule, specifically allowing inspection by *state* officials of a national bank's records "*solely* to ensure compliance with applicable State unclaimed property or escheat laws. . . ." 12 U.S.C. § 484 (b) (emphasis added). The amended language of this statute indicates that Congress intended to allow the states one narrow exception so that their officials could inspect a national bank's records "solely" for the purpose of ensuring compliance with state unclaimed property or escheat laws. The fact that Congress expressly limited this review as the "sole" exception available to the states under application of the general prohibition on visitorial inspections should end the inquiry. Thus, as a matter of statutory interpretation, Congress has explicitly limited a state's ability to inspect a national bank's books and records and Petitioners' argument that a state legislative committee may somehow avoid the express restrictions contained in Section 484 is directly contradicted by the terms of the statute.[3]

---

[2] There is no claim by Petitioners that their proposed inspection is (1) "authorized by *Federal* law;" (2) vested in the courts of justice; or (3) directed by Congress, either House or an authorized committee.

[3] Apparently for the purpose of implicitly undermining the historic protections of the National Bank Act, Petitioners argue that Congress

In addition to the plain language of Section 484, the legislative history of the 1982 amendments to Section 484 also makes clear that Congress intended subsection (b) to create the sole basis for a state's examination of the records of a national bank:

> The bill permits review of national bank records by state auditors and examiners. Such reviews of relevant documentation may be conducted ***solely to determine compliance with applicable state unclaimed property or escheat laws*** if such officials have reasonable cause to suspect that a bank has violated those laws.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 29 (1982) (emphasis added). This legislative history contains no ambiguity. Indeed, its language is almost identical to the language of the statute. Thus, assuming this Court finds it necessary to examine the legislative

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"reaffirmed" in the Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal") Pub.L. No. 103-328 § 102(b) 108 Stat. 2338 (1994), the states "continuing authority over national banks in the areas [of] community reinvestment, consumer protection, fair lending and the establishment of intrastate branches." *See* Petition p. 12. Petitioners' argument is easily dismissed by further review of the provisions of Riegle-Neal, its "Rule of Construction" and its legislative history. First, the statute expressly provides an exception to the language quoted by Petitioners "when Federal law pre-empts the application of such state laws to a national bank," thus evincing Congressional intent to leave untouched all protections created by statutes such as the National Bank Act. Second, the "Rule of Construction" adopted by Congress states: "[n]o provision of this subsection may be construed as affecting the legal standards for preemption of State law to national banks," thus making clear that Congress did not intend to affect the existing standards for preemption. Finally, the legislative history of the statute expressly states that "[f]ederal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking systems," which supports the deference given by the lower courts in this case to the OCC's interpretation of Section 484. As a result, Petitioners' reference to Riegle-Neal is simply a "red herring" that does not support review of this case.

history of a plain and clearly written statute, the Petition still should be rejected.

Finally, in construing Congressional intent, it also is important to recognize that the OCC had broadly construed the visitorial power limitation for a long time prior to the 1982 amendments. *See* 36 Fed. Reg. 17000 (August 16, 1971), as amended at 39 Fed. Reg. 3928 (January 31, 1974). The fact that Congress did not act to "set the record straight" while it was amending Section 484 (including the visitorial power limitation language itself) is further evidence that Congress approved of the way the OCC had interpreted the statute. *See Haig v. Agee*, 453 U.S. 280, 300 (1981) ("Congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy").

Accordingly, the congressional intent to prohibit state examinations of a national bank's records is clear from the face of Section 484 and its legislative history and the lower courts properly held the legislative subpoenas to be visitorial, and therefore prohibited, within the meaning of Section 484. As a result, the Petition should be denied.

(3) The Fifth Circuit Court of Appeals properly gave controlling weight to the OCC's interpretation of visitorial power under Section 484.

As Petitioners acknowledge, if the OCC's interpretation of Section 484 defines the term "visitorial powers" in a way that is reasonable in light of the legislature's revealed design, a court should give the administrator's judgment "controlling weight." *See* Petition p. 8-9, quoting *NationsBank v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813-14 (1995). Thus, Petitioners do not seek to challenge the proper legal standard applied by the lower courts in deferring to the OCC's reading of Section 484; they complain instead about its application on the particular facts present in this case.

In this regard, it is unquestioned that the OCC has construed the limitation on "visitorial powers" contained in Section 484 to mean that all state officials are barred from examining, inspecting, or requiring the production of the records of a national bank except in those instances expressly authorized by Congress:

> The exercise of powers over national banks is vested in the Comptroller of the Currency .... *Other officials,* including state banking officials, *have no authority to conduct examination or to inspect or require the production of books or records of national banks,* except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws [and except with regard to shareholder lists] ....

12 C.F.R. 7.6025(b) 1993) (emphasis added) (incorporating subparagraph (a)). *See* Appendix p. A-22 through A-23.

Indeed, the OCC has consistently construed Section 484 to mean that states have no authority to examine the books of national banks. It recently opined in a February 26, 1993 Interpretative Letter:

> *The few specific, narrow exceptions to the visitation prohibition in 12 U.S.C. § 484(a) evidence an intent by Congress that the OCC exercise nearly exclusive powers upon national banks.* The fact that the States have no general authority to examine the books, records and assets of national banks is further supported by 12 U.S.C. § 92a(c), which expressly permits state authorities a limited right of access to reports of examination prepared by the OCC relating to trust activities of national banks .... *Although there may be no comprehensive definition of 'visitorial' powers, they certainly include the examination of a bank's books and records.*

1993 WL 639366 (OCC Interpretative Letter 616, February 26, 1993) (emphasis added) reprinted in Fed. Banking Law Rep.

(CCH) at 83, 456 (R.BO. 30-31). *See* Appendix p. A-14 through A-17.

In accordance with this OCC policy, on June 3, 1993 (prior to the filing of this lawsuit), the OCC issued an interpretative letter in response to an inquiry from Bank One regarding the legality of the legislative subpoenas at issue in this case. The OCC concluded that the subject subpoenas clearly represented a prohibited exercise of visitorial powers by the Texas state legislature:

> For the reasons given below, *it is our firm conclusion that this represents an attempted exercise of visitorial powers by the state authorities* which conflicts with and is therefore preempted by 12 U.S.C. § 484, the federal statute which specifies and limits the circumstances wherein the books and records of national banks may be examined . . . . *In sum, we do not believe that the Bank is required to comply with the subpoenas in question.* This attempted exercise of visitorial power by local officials is not 'authorized by Federal law', conflicts with the express terms of 12 U.S.C. 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

1993 WL 740918 (OCC Opinion Letter, June 3, 1993) (R.BO. 41-45) (emphasis added). *See* Appendix p. A-8 through A-13. Consequently, given the OCC's consistent interpretation of "visitorial" power to include all examination or inspection of the books or records of a national bank, even by state legislators, the only issue raised by the Petition is whether the OCC's interpretation is "reasonable in light of the legislature's revealed design . . . ." *NationsBank v. Variable Annuity Life Ins. Co.,* 115 S.Ct. 810, 813-14 (1995).

As discussed in section (2) *supra,* not only is the OCC's interpretation of Section 484 a reasonable one, it is the only reasonable interpretation that can be derived from the plain

language of the statute and its legislative history, both of which unambiguously state that reviews of a national bank's records by state officials are permissible "solely to ensure compliance with applicable State unclaimed property or escheat laws ...." 12 U.S.C. § 484(b). As a result, the Petition should be denied.

(4) The "plain statement rule" of *Gregory v. Ashcroft* has no application in this case.

Petitioners argue that the lower courts' decisions are inconsistent with the plain statement rule in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which held that "[i]f Congress intends to alter the 'usual constitutional balance between the states and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanton*, 473 U.S. 234, 242 (1985)). As Petitioners further acknowledge, the application of this rule, even when properly invoked, turns on an analysis of whether the prohibited state act "goes to the heart of representative government." *Id.* at 461. In this case, Petitioners' argument fails to raise application of the principle under either standard and therefore does not provide a basis for review by this Court.

First, Congress has made "unmistakably clear" on the face of Section 484 its intention to prohibit the review of a national bank's records by state officials, except for the extremely limited purposes of ensuring compliance with state unclaimed property or escheat laws. It is difficult to imagine how Congress could have worded a clearer expression of its intent than by stating that these were the "sole" exceptions to the general prohibition of a state's review of a national bank's records. As a result, even if the "plain statement rule" applied to this case, the wording of the statute clearly expresses congressional intent to prohibit the review sought by the legislative subpoenas. Petitioners even conceded in the Fifth Circuit that "[w]ithout question, 12 U.S.C. § 484 is intended to pre-empt state visitorial powers over national banks." *See* Appellant's Brief at 25.

Second, a conflict can exist between federal and state laws not only in the specific terms of a statute but also in the "practical administration" of the policy upon which the statute is based. *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405 (1973). According to *Dublino,* whenever the application of a state law would "plainly and palpably" interfere with the *policy* underlying the federal law, the state law is preempted. *Id.* The subpoenas at issue in this case not only violate the letter of federal law, their enforcement would also conflict with the underlying purposes behind the National Bank Act and in particular Section 484. The "underlying purpose for the creation of national banks is to provide a uniform and reliable national currency." *Preston State Bank v. Ainsworth,* 552 F.Supp. 578 (N.D. Tex. 1982), *citing Mercantile National Bank v. New York,* 121 U.S. 138 (1887). By making national banks subject to the exclusive visitorial powers of the OCC, Congress intended to protect national banks from duplicative, expensive and wasteful reporting practices that could unreasonably burden them. *See National State Bank v. Long,* 630 F.2d 981, 988 (3d Cir. 1980). The subpoenas issued in this case conflict with the purpose of the National Bank Act because it is clear Congress did not intend to subject national banks to general inquiry by state officials no matter how well intentioned.[4] Congress enumerated only two narrow exceptions to Section 484(a)'s limitation on visitorial powers, thus indicating its intent that no other exists.

Third, the ability of a state legislative committee to inspect the records of a national bank is not among the state decisions that "go to the heart of representative government." To the contrary, national banks are the creation of federal law and are subject to scrutiny by the states only where expressly permitted. Congress has constructed a comprehensive scheme in which the

---

[4] If every state legislative committee had the right to subpoena national bank records the duplication, waste and commensurate loss of efficiency in the national banking system would be staggering.

supervision and examination of national banks is made the exclusive responsibility of the OCC. *See* 12 U.S.C. § 481 (giving the Comptroller the right to conduct "thorough examination of all affairs of [a national] bank"). Accordingly, Section 484's prohibition against Petitioners' attempt to review the records of Bank One in no way infringes on state sovereignty. Instead, Petitioners' subpoenas represent an attempt to invade the federal authority to regulate the national banking system. *See Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("an attempt by a state to define [national banks'] duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge [their] duties. . . .."). Accordingly, the Petition should be denied.

CONCLUSION

For the preceding reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

February 1, 1996

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

L. P. PATTERSON, et al., *Petitioners,*

v.

NATIONSBANK OF TEXAS, N.A., et al., *Respondents.*

consolidated with

L. P. PATTERSON, et al., *Petitioners,*

v.

BANK ONE, TEXAS, N.A., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' CONSOLIDATED REPLY TO BRIEFS IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THIS COURT:

The petitioners, referred to below as the "State Representatives" or "Legislative Committee," now file their consolidated reply in support of petition for writ of certiorari:

THE BANKS' ARGUMENTS FOR DENYING THE PETITION LACK MERIT.

A. This issue is likely to recur; the Banks' arguments to the contrary wrongly assume the States cannot legislate in the field of national banking and that state subpoena power is inconsequential.

The Banks assert this case arose out of "unusual circumstances," and that the issue--whether legislative subpoenas are preempted by the Federal Reserve Act (the "Act"), 12 U.S.C. §484--has now been litigated for the first and last time. N.B. at p. 5. [1] This argument makes sense only if one assumes the States cannot, or will not, legislate in the area of national banking. But although there is little doubt that Congress could exercise its commerce power to exclude state control over national banks, it has not done so. In only a few instances has Congress explicitly preempted state regulation of national banks. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

The Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal") recently reaffirmed the States' continuing regulatory authority over national banks in the areas of community reinvestment, consumer protection, fair lending and the establishment of branches. *See* Pub. L. No. 103-328, § 102(b) 108 Stat. 2338 (1994) (amending 12 U.S.C. § 36). Despite

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1 "N.B. at p. ___" refers to the Brief of NationsBank in Opposition to Petition for Certiorari. "B.O. at p. ___" refers to Brief of Bank One in Opposition to Petition for Certiorari.

congressional support for dual regulation, the court below accepted the sweeping argument that a state legislative committee drafting or studying legislation may not compel national banks to disclose information.

The Banks' response also assumes that subpoena power is inconsequential to the legislative process. But state legislatures, like the courts, cannot intelligently address questions of policy without an understanding of the facts. The decision below, upholding the Comptroller's construction of the Act, hinders the efforts of state legislatures to educate themselves about the very areas in which they may legislate. As long as regulation of national banking is one of dual control, that decision will have wide application and serious consequences.

The Banks argue this case is unique because they cannot find another reported case in which a bank and a legislative committee litigated the definition of "visitorial." In other words, because this particular controversy has not been the subject of a reported case, it must be "unusual" and therefore lacking in importance. But the importance of a case rests not on the existence of other cases with identical facts, but on the important and recurring nature of the issue raised: the meaning of "visitorial" under 12 U.S.C. § 484. As the numerous cases interpreting the term "visitorial" show, this issue has been a source of repeated conflict in the law.[2] The distinguishing

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2 *See Guthrie v. Harkness*, 199 U.S. 148, 156-58 (1905) (inspection of bank records by shareholder held not to be visitorial); *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881) (county tax audit held not to be visitorial); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749, 751 (7th Cir. 1945), (subpoena by Office of Price Administration for bank records held not to constitute exercise of visitorial power), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.) (NLRB subpoena requesting bank records held not to constitute exercise of visitorial power), *cert. denied*, 326 U.S. 731 (1945); *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105-106 (D.C. Cir. 1939) (SEC subpoenas for

facts here--that the OCC is now attempting to preempt a core function of the State itself--make this case more, not less, important.

B. The Banks' argument that the "plain statement rule" does not apply is clearly wrong.

1. State sovereignty is endangered by the decision below.

The Banks contend that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is inapposite. Because the States are not involved in the regulation of national banking, their reasoning goes, state sovereignty is not endangered. N.B. at p. 15; B.O. at p. 17. But as shown above, this is incorrect: the States can and do enact laws affecting both state and national banks. The Legislative Committee's petition clearly presents this Court with an opportunity to amplify the holding in *Gregory*, particularly in the context of preemptive agency rulemaking. And it is of compelling importance to our federalist system that this Court do so. Under the reasoning of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S.

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information regarding, *inter alia*, bank lending practices held not to constitute exercise of visitorial power); *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254, 258-259 (W.D. Va. 1978) (SEC subpoena for bank records held not to constitute exercise of visitorial power); *FTC v. Rockefeller*, 441 F.Supp. 234, 243 (S.D.N.Y. 1977) (FTC subpoenas for bank records held not to constitute exercise of visitorial power); *Best v. United States Nat'l Bank*, 739 P.2d 554, 563 (Or. 1987) (class action by depositors to inspect bank records to determine whether NSF charges 'cost justified' and consistent with state contract law held not to constitute exercise of visitorial power); *State v. First Nat'l Bank*, 313 N.W.2d 390, 392-395 (Minn. 1981) (examination of records of national banks by state treasurer to enforce state unclaimed property laws held not to constitute exercise of visitorial power); *Clovis Nat'l Bank v. Callaway*, 364 P.2d 748, 756 (N.M. 1961) (enforcement of New Mexico unclaimed property law against national banks held not to constitute exercise of state visitorial power); *State v. First Nat'l Bank of Portland*, 123 P. 712, 714-716 (Or. 1912) (audit by Oregon Attorney General to enforce escheat laws to unclaimed bank deposits held not to be visitorial).

528, 556 (1985), the "built-in restraints" of state participation in the national political process "ensure that laws that unduly burden the States will not be promulgated."

But if an ambiguous or silent federal statute is later interpreted by an agency administrator to override state sovereignty, and if the courts see themselves as constrained to give "controlling weight" to the agency's construction, the States will lose the slender procedural guarantee identified in *Garcia*.[3] This procedural guarantee is of even greater importance when the preempted state activity is an exercise of sovereignty of the most fundamental sort. The legislative subpoenas here carry this case well beyond those areas traditionally regulated by the States and into the very heart of effective state government.[4]

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3 *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-25, at 480 (2nd Ed. 1988) ("to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests") (emphasis in original); *The Supreme Court, 1987 Term--Leading Cases*, 102 HARV.L.REV. 143, 296 (1988) ("A rule that distills displacement of state law from congressional *silence* divests states of even *Garcia's* slender procedural guarantee") (emphasis in original); *see also Welch v. State Depart. of Highways & Public Transp.*, 780 F.2d 1268, 1276 (5th Cir. 1986) (Higginbotham, J., specially concurring) (if a statute containing ambiguity regarding its preemptive effect is subsequently construed by a Court to override state sovereignty, the states will "have been effectively sandbagged"), *aff'd*, 483 U.S. 468 (1987).

4 The Banks suggest that this case is no different than *NationsBank v. Variable Annuity Life Insurance Co.*, 115 S.Ct. 810, 813-14 (1995) ("*VALIC*"). B.O. at p. 8; N.B. at p. 6. But *VALIC* did not involve an agency construction that preempted a core power of the States. The flaw in the Banks' response is that it leaves out, altogether, the Tenth Amendment. The federal government is intended to be a government of limited powers, while the States are envisioned as retaining substantial sovereign authority. U.S. CONST., Amend. X. This federalist structure of dual sovereignty is viewed as preserving to the people numerous advantages. *See Gregory v. Ashcroft*, 501 U.S. 452, 456-65 (1991).

2. Section 484 does not contain language clearly preempting these subpoenas.

The Banks next argue that the Legislative Committee's reliance on *Gregory* is misplaced, because section 484 contains plain language preempting these subpoenas. Even though the district court concluded that in using the term "visitorial" Congress had not "directly spoken to the precise question at issue" (A-5), the Banks now contend that the term's preemptive effect is unmistakably clear. N.B. at p. 7; B.O. at p. 15. Their position is, however, contrary to the common law, the case law interpreting the statute and the statute itself.

a. The Banks' interpretation of "visitorial" is inconsistent with the common-law definition.

Section 484 derives almost unchanged from § 54 of the National Bank Act of 1864. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1994)). Long before Congress passed the 1864 Act, concepts of visitation were firmly established in the common law. "Visitorial" authority meant the power *to enforce* laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter. *See Dartmouth College v. Woodward*, 7 U.S. (4 Wheat. 673) 518 (1819) (Story, J.); *Allen v. McKean*, 1 F. Cas. 489, 497 (C.C.D. Me. 1833).

The Banks' interpretation necessarily infers legislative intent to alter these common-law concepts in what is now section 484. But statutes are not construed in derogation of the common law, absent clear legislative intent. *See United States v. Texas*, 113 S.Ct 1631, 1634 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent

evident statutory purpose to the contrary); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.").

b. Overwhelming case law applying the common-law definition to section 484 also undercuts the Banks' arguments.

Not surprisingly, the courts have applied the common-law definition of "visitorial" to the language in 12 U.S.C. § 484. In the leading case of *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881), a county tax auditor subpoenaed bank records pertaining to the names of the bank's depositors and the amounts of their deposits. The court held that since the auditor had no power to supervise or control the bank's operations, his subpoena was not an exercise of visitorial power. *Hughes*, 6 F. at 740-41.

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), this Court expressly adopted the *Hughes* definition. Quoting favorably from the "learned judge" in *Hughes*, this Court stated: "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce a due observance of its laws and regulations." *Guthrie*, 199 U.S. at 158. Since then, the state and federal courts have consistently followed *Guthrie* and *Hughes*. *See* cases cited *supra* note 2.

c. The current version of the Act, including the 1982 amendments, does not overrule the *Hughes* line of cases.

Had Congress disagreed with the courts' interpretation, it surely would have amended the statute to overturn these cases. Yet Congress has never sought to repudiate the *Hughes* line of cases. In the 1982 amendments to the Act it continued to rely on the term "visitorial," rather than substituting a broader term such as "discovery" or "inspection," or "review of records."

The new subsection (b) did nothing to change the meaning of "visitorial" in subsection (a), and the Banks' suggestion to the contrary is supported by nothing in the text of the amendment. The Banks repeatedly assert that subsection (b) refers to "state officials" or "state authorities." B.O. at p. 10; N.B. at p. 8. But significantly, subsection (b) does not use those terms; it refers, more narrowly, to "*state auditors and examiners*" who may review a national bank's records only "*to ensure compliance with applicable State unclaimed property or escheat laws.*" This phrasing strongly suggests that Congress understands the term "visitorial" in section (a) to be an *official* examination or audit to enforce laws that regulate the bank. State legislators gathering information in order to draft or propose legislation are not commonly understood to be "state auditors and examiners."

Nor is there anything in the legislative history indicating that the 1982 amendments were intended to overturn the courts' interpretation of "visitorial." The amendments are said to accompany extensive new provisions clarifying the law of unclaimed bank deposits for bank insurance purposes. *See* S. Rep. No. 536, 97th Cong., 2nd Sess. 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3083. If Congress had intended to overturn or limit one

hundred years of case law interpreting "visitorial," one would have expected it to at least mention this objective in the legislative history.[5]

NationsBank also makes much of the language in section 484(a) excepting from "visitorial" those powers that "have been exercised or directed by Congress . . ." N.B. at p. 8. The Bank reasons that if legislatures were not included within the definition of "visitorial," it would not have been necessary to specifically exempt Congress. The Bank, however, reads far too much into this language.

Without question, the national government, as the founder of the corporate charter for a national bank, is the legal visitor. This visitorial power is vested in Congress, as noted in *Guthrie*. *Guthrie*, 199 U.S. at 158 (quoting 1 COOLEY'S BLACKSTONE COMMENTARIES 482, note). Congress, of course, has delegated this power to the OCC. The Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028 (codified in scattered sections of 12 U.S.C.); *see also National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980). The national legislature continues, however, to be the ultimate source of visitorial authority and directs the exercise of that power by virtue of its oversight responsibility vis-à-vis the OCC.

The language of section 484(a), excepting such power as has been or shall be "exercised or directed by Congress," is entirely consistent with Congress' historic role as visitor of all nationally

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5 Congress certainly knew how to make its intent to overturn case law clear. It is instructive to compare the legislative history accompanying the 1982 amendments to § 484 with the conference report accompanying Riegle-Neal: "The amendment made to the Home Owners Loan Act by section 102(b)(5) of the bill overturns an interpretation of that Act in *First Gibraltar Bank v. Morales*, (5th Cir., Dkt. 93-8170, decided on April 29, 1994)." Conf. Rep. to Accompany H.R. 3841, H. Rep. 651, 103rd Cong., 2d sess. 57-58 (1994).

chartered corporations and its delegation of those powers to various federal agencies. However, Congress is the visitor of national corporations not by virtue of its power to enact laws, but by virtue of its authority "*to direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause a forfeiture of their charters.*" *Guthrie*, 199 U.S. at 158 (emphasis added). Even setting aside the history of visitation at the national level, the most that can be gleaned from this language is that Congress intended to make clear its continuing authority over national banks.

It is one thing to note the national legislature's historic powers of visitation over national corporations; it is quite another to leap to the conclusion that all legislatures everywhere have visitorial authority. This is not the case. Indeed, the Texas legislature cannot even exercise such authority over state-chartered corporations. In Texas, exclusive visitorial power is vested in the Texas Attorney General. TEX. REV. CIV. STAT. ANN. art. 1302-5.01, *et seq.* (Vernon 1980 & 1995 Supp.); *Humble Oil & Refining Co. v. Daniel*, 259 S.W.2d 580, 589 (Tex. Civ. App.--Beaumont 1953, writ ref'd n.r.e.), *cert. denied*, 347 U.S. 936 (1954).

Further, the Banks' erroneous conclusion that all legislatures have visitorial power does not complete the analysis. As is made clear in *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254 (W.D.Va. 1978), a claim of visitation must stand or fall based on a determination of the purpose of the investigation, because "any inquiry into the operations of a bank is not automatically a 'visitorial power' which is prohibited." *Id.* at 259. As there is no dispute that the Committee's subpoenas are not for the purpose of supervising or controlling the Banks, they cannot, as a matter of law, be visitorial.

In sum, the Banks have argued that, as the term "visitorial" clearly and unmistakably preempts these subpoenas, *Gregory* does

not apply. But, if anything, the common law, case law and 1982 amendments show just the opposite: that Congress did not intend to preempt this type of state activity. It follows, inescapably, that the Comptroller's construction is both clearly unreasonable and at odds with the teachings of this Court in *Gregory*.

C. *Long* does not stand for the proposition that legislative subpoenas are visitorial.

Both Banks rely on *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980). B.O. at p. 8; N.B. at p. 7. However, the Banks have loaded *Long* with far more freight than it can carry. That case held only that the New Jersey Banking Commissioner, whose powers over state-chartered banks correspond to those of the OCC at the national level, would exercise visitorial power if he were *to enforce* the state's anti-redlining laws against national banks. *Long*, 630 F.2d at 988. Plainly, this holding does not control the legislative subpoenas here and is entirely consistent with the Legislative Committee's position that visitorial power is, at a minimum, the power to enforce laws regulating the Banks.

Of greater relevance in *Long* was the conclusion that though the OCC (instead of the New Jersey Banking Commissioner) would have the visitorial responsibility for enforcing compliance with New Jersey's anti-redlining law, the substance of the state law itself was not preempted. *Long*, 630 F.2d at 986-87. *Long*, it turns out, stands with those cases illustrating that regulation of banking is one of dual control.

D. The petition presents an issue of law; none of the factual assertions by the Banks are relevant to the issue of whether these subpoenas are visitorial.

The issue of whether section 484 preempts the Legislative Committee's subpoenas is a question of law. As noted above, a claim of visitation must stand or fall based on a determination of the purpose of the investigation. *Williams*, 449 F.Supp. at 259. As a matter of law, neither the Committee nor the Texas Legislature as a whole has the power to prosecute violations of law, the power to audit the books and records of a corporation, the power to bring a *quo warranto* action for forfeiture of a corporate charter, or the power to place the assets of a corporation in receivership. The Committee can only conduct studies and propose legislation to the full House. The Committee's subpoena power to compel testimony and the production of documents relates only to its need to properly inform itself in the drafting and proposing of legislation.

The Banks' factual assertions are immaterial to the question of law before this Court. The Banks, for example, raise the issue of "motive," portraying the subpoenas as a "circuitous attempt to regulate national banks" and as "the work of single individual who desires to conduct an inquisition into the lending activities of a national bank . . . to accomplish by subpoena what that individual could not accomplish by legislation." B.O. at p. 3; N.B. at p. 4. As support, the Banks point to speeches made by Rep. L.P. Patterson, Chairman of the Committee, criticizing national banks and to legislation he sponsored that would have subjected them to additional regulation. N.B. at p. 3; B.O. at p. 3.

But the fact that a state representative has made political speeches and sponsored legislation is hardly material to whether section 484 preempts these legislative subpoenas. Moreover, Rep.

Patterson did not single handedly issue the subpoenas in this case, nor could he. Subpoenas must be issued by a two-thirds majority of Committee members, and here, they were issued upon an 8-1 vote in favor of the subpoenas. (App. 52-53; R.NB. Vol. 1, 0011-23, 0127-28). In suggesting the motivations and past legislative initiatives of a state representative are somehow relevant to whether a legislative subpoena is visitorial, the Banks seem to be urging a procedure whereby federal courts look behind a lawfully issued state subpoena and examine the feelings and policy preferences of the issuing state legislator. It would be difficult to imagine a more pernicious procedure.

The Banks' complaint that Rep. Patterson has introduced several bills imposing taxes and special reporting requirements on national banks merely underscores that state legislatures can and do enact laws affecting national banks. For example, in 1995, pursuant to Riegle-Neal, the Texas Legislature passed House Bill 856, opting out of interstate branch banking. 74th Leg., R.S., Ch. 58, §§ 1-3, 1995, Tex. Sess. Law Serv. 437-38 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 489f. (Vernon Supp. 1996)). The bill prohibits out-of-state national banks from establishing de novo branches, or acquiring a branch by purchase or otherwise, in the State of Texas. This legislation alone should dispel any lingering notion that a subpoena served on a national bank can never have a legitimate legislative purpose.

Finally, the Banks place a great deal of emphasis on the scope of the subpoenas and their alleged burdensomeness. B.O. at p. 4; N.B. at p. 2. The scope of the subpoenas, however, is irrelevant to whether they are an exercise of visitorial power preempted by the Act. A legislative subpoena that is not by definition "visitorial" cannot become so simply by requesting more information. Furthermore, the record establishes that though many

categories of requested information--such as credit policies and manuals---could be provided at little or no cost to the Banks, they have refused to turn over *any* information, not just information they contend would be difficult to compile. The Banks have also refused to make their representatives available to testify. The Committee has repeatedly stated its willingness to modify the subpoenas to make the production of the information less costly and time consuming--as long as the documents provided meet the Committee's legitimate need for information. (App. 52-54; R.NB. Vol. 1, 0127-29.) But rather than working with the legislature to ensure that needed information is provided in the most efficient manner possible, the Banks have chosen litigation.[6]

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6 The Banks illogically blend their preemption argument with separate and distinct challenges to these subpoenas. Arguments that the subpoenas inquire into matters outside the jurisdiction of the Legislative Committee, or claims that the scope of the subpoenas is unduly burdensome, raise issues of state law. If the Banks seriously doubt the jurisdiction of the Committee to issue these subpoenas, they should dismiss this case and raise their claims in state court. *See American Bank and Trust Co. v. Dent*, 982 F.2d 917, 921-922 (5th Cir. 1993). NationsBank also submits as undisputed that complying with the Committee's subpoenas would require the expenditure of thousands of hours in employee time, as well as the expenditure of a million dollars or more. (R.NB. Vol. 2, 0104-06). The Committee obviously disputes this assertion, as the affidavit of Chairman Patterson shows. (R.NB. Vol. 1, 0127-30.) It is axiomatic that summary judgment is appropriate only if, after adequate discovery, there is no genuine dispute over any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To the extent that NationsBank's challenge to these subpoeans is based on allegations of burdensomeness, there is not only a factual dispute; discovery is not yet complete. Summary judgment is therefore premature.

CONCLUSION

The State Representatives' petition for writ of certiorari should be granted.

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